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FOREWORD

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THE BAR (West Virginia)

Volume 9 --- 1902

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Buffalo, N. Y.
March 1963

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PLEASE NOTE:

Issue No. 6-7 (June-July) error in paging should have started page 263 instead of 271 (as covers are paged in on other Issues.) Pages Nos. 295-310 are not included, again an error in paging.

Issue No. 8-9 (Aug.-Sep.) error in paging as it is different copy than in No. 6-7 of same page numbers.

All known complete Volumes were checked for this data.

JANUARY, 1902.

THE 

BAR

THE NEW YEAR'S LEAF.

Lord, let me never tag a moral to a story, nor tell a story without a meaning. Make me respect my material so much that that I dare not slight my work. Help me to deal very honestly with words and with people because they are both alive. Show me that as in a river, so in a writing, clearness is the best quality, and a little that is pure is worth more than much that is mixed. Teach me to see the local colour without being blind to the inner light. Give me an ideal that will stand the strain of weaving into human stuff on the loom of the real. Keep me from caring more for books than for folks, for art than for life. Steady me to do my full stint of work as well as I can: and when that is done, stop me, pay what wages

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THE BAR.

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THE BAR.

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Under the Editorial Charge of the Executive Council.

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An Open Forum.

This journal is intended to furnish an open forum to every lawyer for the discussion of any policy or proposition of interest to the Profession. It invites a free interchange of views upon all such topics whether they agree with the views of THE BAR or not.

THE BAR goes to every Court House in the State and is read by, probably, three-fourths of the lawyers of the State, and thus furnishes not only a ready medium of communication between members of the Profession, but of unification of the Profession on all matters of common concern, which is its prime mission.

Every clerk of a circuit court is the authorized agent of THE BAR in his county, and has the subscription bills in his possession, and will receive and receipt for all money due on that account, or for new subscriptions, and his receipt will always be a good acquittance for money due THE BAR.

THE BAR is furnished at the nominal rate of \$1.00 a year, which is less than the cost of publication, and we would like to have the name of every lawyer in the State on our subscription list.

THE New York Court of Appeals has recently decided that "a divorce procured by a wife in a sister State, on the ground of cruelty, by substituted service of process upon the husband, and without his appearance or submission to the jurisdiction of the court, is ineffectual to bar her right of dower in real estate of the husband in this State, though acquired after such divorce. So held where it appeared that the husband had remarried in a third State upon the faith of the divorce, the present action being by the former wife against the second wife and the issue of the second marriage."



WE so frequently see the stock argument used by our exchanges against a high standard in our law schools, to wit: that it "debars poor young men from the advantages of these schools," that we have an increasing curiosity to know just what kind of an elastic standard these objectors would devise. Would it be a double standard, one for the rich and another for the poor; or would they let the whole profession down to the level of the most indigent? Will some of these critics enlighten us.



THE tobacco growers, the tobacco merchants, and the makers, sellers and smokers of cigars have a considerable interest in the decision of the Supreme Court of the United States in the Fourteen Diamond Rings case. By that decision, Manila cigars have the freedom of the Custom House and are added to the long list of domestic cigars. On account of the duty they have not been much smoked in this country for a good many years. Will they now come into favor again and will they hit the difficult and sensitive palate of the American smoker?

THE subscription bills for the year 1902 are now in the hands of the Circuit Clerks. Our subscribers will please take notice and govern themselves accordingly. If you want **THE BAR** this year, give your Circuit Clerk an early New Year's call.



THE Court of Appeals has adjourned and we have a large batch of decisions handed down during the term. They came too late for publication in this issue, but will appear in the February and subsequent issues until the full work of the Court has been presented to the readers of **THE BAR**.



THE governor of Arkansas has resorted to a novel method of compelling the legislature to provide a State Reform School. He has pardoned every woman incarcerated in state prison, giving as a reason that Arkansas has no separate place in its penitentiary system for women; and that he will not be a party to keeping women in the penitentiary under existing conditions.



ALFRED SMITH, colored, who shot and killed his wife last September, has been sentenced by Judge Ralston, in the Court of Oyer and Terminer, Philadelphia, to death by hanging. The accused had pleaded guilty and as he demanded no trial by jury, the judge heard the evidence, decided upon the grade of the crime and pronounced the sentence. This procedure, in capital cases, is permissible by the laws of Pennsylvania, but it is very rare.

The Annual Meeting.

THE eighteenth annual meeting of the State Bar Association will be held at Clarksburg either on the 11th and 12th or on the 12th and 13th of next month. We anticipated that we would be able to publish the full program in this number, but a few of the details have not yet been definitely determined, and the publication will be postponed until our next issue, on the first of February, which will be in ample time to reach all members of the Association.

Our hosts, the Clarksburg bar, are planning great things for the meeting, and it goes without saying, that that large and distinguished bar will not only make it a delightful social occasion, but it will be exceptionally entertaining from an intellectual and professional standpoint.

A varied and striking program is in course of preparation, which will appeal to the members of all sections of the State, and we feel assured that the meeting will be largely attended and be remembered as of inspiring interest. Every year notes an advance in the attendance and interest in the work of the Association, and its influence and power as a professional organization is being recognized all over the State. In two years more we will celebrate the twentieth anniversary of the history of the Association, which we will want to make a jubilee occasion in which the full membership will participate.

The first essential to a profitable annual meeting is that the several standing committees should make comprehensive reports covering the several lines of work within the purview of the association. In this way only, is the Association able to give intelligent consideration to the practical matters which should occupy its attention. The annual meetings are too short to mature and discuss these subjects unless they have

first been formulated and systematically presented by committees. As members of these committees are necessarily scattered over different localities it devolves on the chairmen to obtain by correspondence such suggestions upon the matters committed to them, as the several members desire to make, and then put them in form and agree upon a full report when the members come together at the annual meeting. The list of the committees is kept standing in THE BAR.

The next issue of THE BAR will appear promptly, not later than the first of February, when the full program of the meeting will be announced.



THE death of Judge John Brannon has removed one more of that older generation of lawyers whose number is growing rapidly small in the State. One of the most striking features of the several county bars at this time is the absence of that particular few who were recognized as the pioneers of the Profession, and whose places have been taken by very young men. This change seems to have come so suddenly as to have a semblance of a revolution. Judge Brannon was an able and honorable representative of his profession both as a man and a lawyer. He lived to a ripe old age, and up to the time of his death seemed to retain his active interest in public and professional affairs. While he occupied the bench he was recognized as a very clear-headed and able judge, and his memory will be honored by the bar of the State.



Mrs. Newlywed: "I saw a piece in the paper to-night that people would feel better to go without breakfast."

Mr. Newlywed: "H'm! I wonder which of our cooks wrote that?"

THE BAR

Law and Chancery.

"Thou robed man of justice, take thy place,
And thou, his yoke-fellow of equity,
Bench at his side."—KING LEAR.

THERE was a time when the Lord High Chancellor sat in state, the robed and wigged representative of the king. He did not trench upon the domain of the law courts. When the strict rules of the common law afforded no relief, and when righteousness and the royal conscience found it necessary that relief should be given, the chancellor wielded the merciful rod of equity. The dignified judges of the law courts also sat in robes and wigs, and, keeping away from the jurisdiction of the chancellor, they administered the common law.

In some of our States both the common law and equity procedures have been abolished, and in their places the sickly infant, christened "Code Practice," has endeavored to cut his teeth on the common law rules, and to suck his nourishment from the milk-bottle of equity. Whatever relief may be sought in the courts is sought by methods which do not distinguish between equitable and legal procedures as these formerly existed. You cannot tell whether the person who presides in these courts is a chancellor or a common law judge, or neither. But if a man has equitable rights to enforce he goes after them in reliance upon principles of equity, whatever may be the procedure. In like manner, if he goes after common law rights, he relies upon common law principles.

We should be thankful that in our own State, and also in some of the others, the distinction between the two varieties of procedure has not been abolished. True we have no separate chancellor and common law judge. Our judge is both. We have retained the equitable procedure and

the common law procedure, and the distinctions which existed in former times between these two procedures. We have modified each of them, but the modifications have been made conservatively and with due regard to the principles underlying the procedures, which are principles out of which the procedures themselves originated, grew and developed.

An emphatic illustration of the folly of undertaking to do away with the two kinds of procedure, and to substitute in their places a dwarfed and misshapen Aphrodite, who instead of developing from a child, was cast full grown upon the sands, is to be seen in some of the States which have undertaken to seat the chancellor and the common law judge upon the same bench and have them each pursue at the same time his separate course.

The case of *Parrish v. Graham*, 39 S. E. Rep. 825, was decided by the Supreme Court of North Carolina. A company whose name is very suggestive of the beautiful and rich variety of garters which the readers of *THE BAR* would only see in the show windows of the jewelry shops, the Golden Belt Hosiery Company, executed a promissory note with Carr and Smith as joint makers. The stockings do not seem to have been attractive to the trade, and the company became insolvent. The holder of the note brought suit against the three makers, the company, Carr and Smith. No reason was suggested why the plaintiff should not recover against all three of the defendants, and the common law judge was preparing to bring down his gavel and to render judgment. Smith, however, presented the suggestion that he and Carr were, as between the company and themselves, merely sureties upon the note, and the further suggestion that Carr was the principal surety and that Smith himself was only the "supplemental" surety. He thereupon suggested that the court should proceed to determine the rights of these two sureties as between themselves, although the

plaintiff had never known of the relations of the parties except as these relations appeared upon the note and showed them to be joint makers with an equal liability. But the chancellor who sat beside the common law judge proceeded to raise his wand. Law and equity were no longer separate, but had been converted into a pair of Siamese twins or a two-headed lady. Both of these must proceed at once. Of course the plaintiff had nothing to do with this equitable controversy between the defendants, and the suit was the plaintiff's suit brought to assert the plaintiff's rights. What difference did that make? Law and equity have been conjoined together. They must not be separated. And so it went, and the plaintiff sat by and pretended to turn the legal wheel while the equitable machine was vigorously worked by the two defendants, the result being that the same judgment eventually settled the legal rights of the plaintiff and the equitable controversy between the defendants. May we be spared from such mix-ups as this case is an example of.



Code of Ethics.

WE print the full text on another page, of the report made by Judge Jacobs of the committee to prepare a code of ethics.

We have not had time to give the report that careful consideration which its importance deserves, and therefore reserve any discussion of its provisions until a future time. We have no doubt that Judge Jacobs has given it his usual care and good judgment, and that it will be found worthy of adoption by the Bar Association.

It will be presented at the coming meeting of the Association, and we print it in advance of the meeting in order that members may have time to digest it before called on to pass upon it.

A Far Reaching Question of Evidence.

THE question of evidence in the now celebrated Barker-Kellar case, recently tried in New Jersey, has not only given rise to warm discussion among members of the Profession, but it seems destined to have a far reaching effect in future trials for murder and lynching.

In other words the ruling in this case is accepted as a direct departure from what is termed the "unwritten law"—that a man may kill the despoiler of his home with impunity; that if there is no law for it, there is none against it; and that no jury would find a verdict against a defendant who took the law into his own hands for such cause.

This unwritten law had come to be recognized in almost all the courts of the country, but especially in the South, where lynching has become almost the matter-of-course penalty for such crimes.

In the Barker-Kellar case, it will be remembered, the defendant laid in wait for his victim and shot him from ambush without a word of warning or explanation. On the trial the defence wanted to prove that immediately before the shooting, the wife of Barker had told him that Kellar had committed rape upon her. This the judge refused to admit. This ruling, of course, is a repudiation of the very generally accepted theory that the effect of such a disclosure upon the mind of an injured husband is something which a jury might properly consider in passing upon the question of moral responsibility.

It seems that the echo of this adverse ruling has already been heard as far South as the state of Alabama. In *Williams vs State*, 80 So. R. 484, the evidence tended to show that the defendant and his wife conspired together to kill the deceased, because he had, several months prior to the killing,

ravished the defendant's wife, and that in carrying out said conspiracy the wife had lured the deceased to the defendant's house by writing him a note, and that while the deceased was at defendant's in response to said note he was killed. It was held that the trial court did not err in charging the jury as follows:

"If the jury believe from the evidence beyond all reasonable doubt that the deceased, several months prior to the killing, did have sexual intercourse with the defendant's wife, with or without force, and that the defendant, in Bibb County, Alabama, and before the finding of this indictment, killed the deceased by decoying him to his (defendant's) house and by lying in wait for him, on account of such illicit intercourse between deceased and defendant's wife, then defendant is guilty of murder in the first degree, and it is the sworn duty of the jury to so find their verdict."

It appeared that counsel for the defendant in their summing up endeavored to impress upon the jury that the killing was justifiable by reason of the debauchery of the defendant's wife, and stated that defendant was simply protecting the virtue of the wives and daughters of the citizens of the county where the killing occurred, and that he had done nothing more than what any man on the jury would have done. It was held that under such circumstances it was not error for the trial court to charge.

"Courts are established to administer the law and enforce its execution. The law is the only standard by which judges and jurors can be governed, and, in considering their verdict, jurors should be governed by the law as given them and by the evidence. The only protection to the life, liberty and property of the citizen is in a prompt, honest and impartial enforcement of the law; and if juries should intentionally and willfully disregard the law, then the law is useless, and the court houses and jails might as well be torn down, the offices of judge, clerk and sheriff, and all other machinery necessary for the administration of the law, be abolished, and save the people the tax paid for maintaining and carrying on the courts."

The supreme court further took occasion to comment in

somewhat drastic terms upon the conduct of counsel, as fellows:

"It is much to be regretted that counsel, who are officers of the court and under a special and solemn duty to support and uphold the law and to conserve its due administration by courts and juries, should thus, in the zeal of advocacy or under the bias of extreme partisanship, so far forget their duties to the courts and to organized society as in effect to call upon jurors to disregard their oaths, to trample under foot the law which they themselves, as members of the body politic, have participated in making for the just and equal protection of all the people, and to try and determine this cause upon considerations which the experience and wisdom of the ages have demonstrated to be subversive of all order and authority, and logically leading to the substitution of private vengeance, the retribution of the assassin, and the terrors of anarchy, for the law of the land and its ministers. It is deplorable to the last degree that counsel charged to aid jurors should seek to turn them from the plain road of the law leading to manifest justice into the devious and noxious byways of prejudice and passions and perjured conscience, leading to acquittal of a self-confessed murderer, and even beyond to his commendation as for a service rendered to the county, in that he decoyed one of her citizens within the easy range of his rifle and, from behind his back, brutally shot him to death. It is to the credit of the County of Bibb that her jurors were not swerved from their duty by these illegitimate appeals and asseverations, and it is to the credit of the judiciary of Alabama that the learned judge who presided at the trial took occasion to uphold the dignity of the Bench and the reign of law in charge to the jury."



Between Salford and Manchester is a glue factory. A lady who was obliged to take a ride between these two points quite often always carried with her a bottle of smelling salts. One morning an old farmer took the seat directly opposite her. As the train neared the factory the lady opened her bottle of salts. Soon the whole carriage was filled with the horrible odor of the glue. The old farmer stood it as long as he could and leaned forward and shouted: "Madam, would you mind puttin' the cork in that 'ere bottle?"

Having Fun with the Courts.

IN the last number of the *Virginia Law Register*, Mr. W. G. Mathews, of Charleston, has presented a very readable exposition of the recognized method in the two Virginias of getting the law to (or rather, at) the jury through what we term "instructions."

Mr. Mathews' text is very appropriately expressed in the quotation of the single line printed at the head of his article:

"Tis the sport to have the engineer hoist with his own petard."

The suggestion in this quotation is a very accurate and vivid characterization of our system of trial practice in this particular. Instructions to the jury are no longer recognized in our practice as having any purpose or expectation of informing the jury of the law of a case, but rather of a cold-blooded, yet legitimate purpose of laying a trap for the trial judge by which he may be hung up in the Court of Appeals. Mr. Mathews reaches a fine irony of description when he defines the practical effect of the "instructions" in enlightening the jury:

"When it is considered," he says, "that the jury have had these instructions read to them but once, usually at the close of the argument, and that frequently such instructions teem, more or less necessarily, with technical expressions from legal, medical and other professions, possibly heard by the jurors for the first time, and that the jury are not permitted, even should they startle counsel by requesting it, to take the instructions with them to the jury room to examine their meaning, application and effect, the humor of the situation increases. It is believed that observation of a jury—an average, fairly intelligent jury—during the reading to them of the instructions, say in an ejectment case, will show that there is at least a chance that some of them do not hear the

important portions at all; an additional chance that they forget the portions heard before reaching the jury room, and a practical certainty that some of them wholly fail to understand another portion of what they may have both heard and remembered."

It might be added that, as a matter of fact these instructions are, as a rule in our practice, presented to the jury, not at the close of the evidence when the law ought to be determined, and when the case might therefore, be argued both upon the law and the evidence; but they are given at the close of the argument when the law has been presented by the opposing counsel from two standpoints, and now the court presents a kind of third edition to add to the confusion of the jury.

We think it is generally recognized by the Profession in West Virginia, that while our practice relating to "instructions" is all right in theory, and it might be made efficient and satisfactory in practice, it has become a failure if not a burlesque, as to its main purpose, by the mode in which it has come to be applied. A sentiment is growing up among the bar in favor of the system of "charging the jury" as a substitute for instructions. But this sentiment is evidently the outgrowth of a dissatisfaction with our present practice—not recognizing that the fault is in the mode in which it is used, and not in the system itself.

We do not want to jump from the hot water into the fire by adopting a substitute that instead of being able to put the trial judge in jeopardy, the trial judge, through lack of discrimination or an impartial spirit, should put counsel continually in jeopardy, though their case be never so conclusive, through the instrumentality of "charging the jury,"—i. e.—making the last speech in the case.

A reform of our practice is easily within reach of the bar by inducing the courts to modify the mode, rather than the system of practice itself, so that the jury may get the benefit

of the instructions—and when that is done, instructions will be drawn from the jury rather than as traps to catch the court. They will be presented before the argument, so that counsel, relying on them, may have opportunity of making them plain to the jury.



Two Stories of Washington.

Dr. Edward Everett Hale in his "Memoirs of a Hundred Years" now publishing in *The Outlook* adds to his own memories those of his father and of others. Some of these anecdotes go beyond the limits of the century; in the instalment for January, for instance, are collected several reminiscences of Washington, from which we take two:

"An old parishioner of mine once told me that the day when Washington entered Boston in triumph, that is, on the 17th of March 1776, he took up his headquarters at the best public house in Boston, which was at the head of State Street, and then called King Street. According to my old friend's account, General Howe had occupied the same inn. The mother of my informant was the daughter of the keeper of the inn, and was a little girl playing about the house, and, of course, interested in all that passed. Washington, with his usual kindness to children, called the child to him and said, 'You have seen the soldiers on both sides; which do you like best?' The little child could not tell a lie any more than he could, and with childish frankness, said she liked the redcoats best. Washington laughed, according to my friend's story, and said to her, 'Yes, my dear, the redcoats do look the best, but it takes the ragged boys to do the fighting.' This is one of the well-authenticated anecdotes which disproves the old demigod theory that Washington never smiled."

"When I was in college, Jared Sparks, always a friend, was lecturing on American history. I stopped after the lecture to ask him some question, and he told me this story of the Battle of Princeton. I dare not call it my personal touch with the Revolution, but it removes me from it only by one gap. Sparks told me of the Massachusetts officer, whose name he did not give me, who was at Princeton on the day of the battle. There is a certain bridge, which the well-informed reader will remember, which it was important to destroy. Washington instructed this Massachusetts captain to take a file of men and destroy the bridge. The captain touched his hat and said, 'Are there enough men?' and Washington said, 'Enough to be cut to pieces.' This gentleman told Dr. Sparks afterwards that as he went back to his men he pinched his cheeks for fear that they would see that he was pale; and they destroyed the bridge."

Longest and Shortest Day.

New York never has more than fifteen hours of daylight, while Spitzbergen has three months.

The days in New York are rapidly shortening, and ere long we will have what we call the shortest days in the year. When speaking of the shortest or longest days in the year, however, it is quite important to mention what part of the world we speak of. For instance, in New York city the longest day is 15 hours. Were it not for the Jersey hills, which hide the sun from Gotham as it recedes in the Western horizon, our days would be at least twenty minutes longer.

The shortest day in any part of the world is at Tarnea, Finland, when Christmas Day is less than three hours in length, while on the other hand June 21 is nearly 22 hours long.

But this is nothing, in point of length of days, when compared to Spitzbergen, Norway, where the longest day is three and a half months in length! That is for three and a half months there is no night.

At Wardbury, Norway, the longest day lasts from May 21 to July 22—one day over two months—without interruption.

St. Petersburg, Ruwin, and Tobolsk, Siberia, have both very long and very short days. The longest day in Stockholm, Sweden, is eighteen and a half hours in length.

Hamburg, Germany, and Dantzle, Prussia, have both seventeen hours of daylight in midsummer.

The longest day in London is 16 hours; but the fogs rob the English metropolis of much of its daylight and often make day appear like night, so that few Londoners really know how long the days are.

The longest day in Hamburg is also sixteen hours.

Even Montreal, Canada, has one hour more daylight than New York. This is due to the fact not only that it is further north, but that as Sol recedes in the west its light is unobscured by Pallsades or Jersey mosquitoes.

Foul Play.

Many amusing stories are told of our colored fellow citizens of the South by the raconteurs of that section.

A venerable "darker" was haled before a justice of the peace and charged with gratifying his appetite for feathered denizens of the barn yard in which he had no ownership. There were no witnesses to the act, but the birds were missing and feathers had been found around Uncle George's cabin. He was sharply interrogated by the magistrate, in the hope that he would get entangled in the questioning and the truth come out. Finally he was asked:

"So you say, Uncle George, that you have not stolen any chickens?"

"No, sah! I done stole no chickens."

"Have you stolen any geeese?"

"No, sah!"

"No turkeys?"

"No, sah!"

After a brief pause the suspected culprit was discharged with a sharp admonition. As he passed out he stopped before the justice, hat in hand, his ivories disclosed by a broad grin, and said:

"Fo' de Lawd, Squire, if you'd said 'ducks,' you'd a' had me!"



Justice Gray in years is the oldest member of the Supreme Court. He was 73 years of age the 20th of last month, and if he lives until next December will have been on the Supreme Bench just 20 years. He is a man of imposing presence. At times he lays aside his great dignity, and is genial and affable. He tells a story on himself; he was out west several years ago, just about the time John L. Sullivan had reached the zenith of his fame. There was a stop over of an hour at a little town in Colorado, and Justice Gray embraced the opportunity to stretch his legs on the platform.

The natives saw this great man walking up and down and began speculating about him. Some one suggested it was John L. Sullivan and immediately the whole crowd gazed in open-mouthed wonder, and the word that the champion fighter was at the station quickly spread, until half the population of the town was crowding about to get a glimpse of the big man. The justice could not understand the demonstration in his honor until one of the citizens said, "Be you really John L. Sullivan, the prize-fighter?"

Taxing Corporations And Stock.

To The Bar:

The property of a corporation should be assessed and taxed precisely as the same property would be if owned by an individual, and its stock should be taxed only so far as its value exceeds the assessed value of the corporate property. For example, a corporation, owning a farm, is capitalized at \$20,000, and pays six per cent dividends. If this farm is assessed at \$20,000, then the stock has no taxable value.

A share of stock is a memorandum certifying that the holder is entitled to participate in dividends, during the life of the corporation, and, after its death, to participate in the proceeds of its property. The value of this right is one thing; the method, by which to determine the taxable value of this right, is another thing. The right to participate should be taxed only so far as its value exceeds the assessed value of the corporate property.

Suppose a corporation and an individual own adjoining farms, each assessed at \$10,000. The individual, adding his brains and labor to this \$10,000 of capital, produces \$1,200 a year: to-wit, six per cent interest on his capital and \$600 for his brains and labor. This being the average income from such a farm, it will rent for \$600; it will rent for six per cent on its assessed value, and out of this rent the landlord will pay taxes. If this farm contributes \$100 to taxes, then a farm which rents for double ought to contribute \$200. Rent is what is left after paying for the brains and labor of the farmer. The excess above rent represents brains and labor furnished by a tenant, not by a landlord. Brains and labor, not being taxable property, this tenant should not be taxed, no matter what be his income. But taxing the landlord is not taxing the tenant. If the landlord receives \$1,200 clear of taxes, then the farm is assessed too low: a rental of \$1,200 represents a farm which should be assessed at \$20,000: the rent in excess of six per cent on assessed value, measures the untaxed value.

When a farm is owned by a corporation the amount, applicable

to dividends, is analogous to rent and, if the amount applicable to dividends exceeds six per cent on the assessed value, then this excess should be taxed, or else the assessment should be increased. Hence, the taxable value of stock may be ascertained by capitalizing the amount applied to dividends and deducting the assessed value of the corporate property and the taxes on such property. For illustration: the amount applicable to dividends is \$1,200: this capitalized at six per cent gives \$20,000—deduct the assessed value of corporate property, (\$10,000) and the taxes paid thereon, (\$100) and we have \$9,900 on which to reckon the taxable value of this \$20,000 of stock. If the dividends, when capitalized, are less than the assessed value of the farm, then the assessment should be reduced. It may be that in many cases stock, though paying large dividends, is not worth par, (for instance, stock representing a patent right which is about to expire,) but our farm illustration shows that, if the subject is thought out to a finish, an honest rule may be formulated whereby to determine the taxable value of stock. And this rule would apply to such property as railroads and bridges. For illustration: a corporation built a bridge between two villages, and, a hundred years ago, five cent tolls barely sufficed to pay six per cent on its cost. The villages have become great cities and a million persons now cross daily. Under an intelligently honest government tolls would be reduced as the travel increased, and the charges so regulated that this line of travel would not be tolled except to pay reasonable compensation for the capital invested. The owners of this bridge should be taxed only on the amount which would be obtained by capitalizing rent, or dividends, at six per cent. The circumstance that this bridge, costing \$10,000, is now capitalized at \$500,000; the circumstance that corrupt politics prevents legislation to regulate tolls; the circumstance that part of the money collected from this line of travel is spent at elections to defeat men who would inaugurate honest government; the circumstance that such men have almost ceased effort to correct abuses, are considerations foreign to an inquiry into the principles which would obtain if honest taxation was practiced.

TAXING FRANCHISES.

Taxing this bridge is one thing; taxing its line of travel is another thing, and taxing the holders of its watered stock is still another

thing. If tolls are unregulated, the tax is paid by persons who use the bridge; according to correct doctrine, this line of travel ought not to be milked except to pay interest on the cost of the bridge; the pauper and the millionaire contribute equally to a bridge-tax, and do not contribute in proportion to their ability. It violates the fundamentals to tax this line of travel in proportion to the unrestrained cupidity of holders of watered stock.

The real question is, whether it is good government to raise revenue by huckstering to the highest bidder a right to plunder the unorganized masses?

A franchise is a prerogative right, viz. a function of government, in the hands of an individual. A miller has two of these rights, to-wit: the right to charge toll, and the right to back water on a neighbor's land, and generally these two rights constitute much the greater part of the value of a mill-property. Suppose this miller sells to several persons associated as a partnership. This partnership is an entity distinct from the individuals composing it, but the faculty of carrying on business as a partnership is not considered taxable property. This partnership would have the two rights acquired from the miller. Suppose this partnership sells to some persons associated as a corporation. This corporation would have the two rights acquired from the miller and would have a third right, to-wit, the faculty of doing business as a corporation. This right to exist as a corporation is not of much greater value than the right to exist as a partnership, and a function of government has the same value when owned by an individual as when owned by a company.

This illustration directs attention to the fact that a tax on what is miscalled the "earning capacity" of a corporation, exercising a prerogative right, is in truth an arrangement to divide illegitimate profits resulting from a gross and most pernicious perversion of the powers of government. In the case of a bridge, costing \$10,000 but capitalized at \$500,000, plunder, extorted from the public, is divided on the basis of \$300 as interest on watered stock for one dollar as taxes, and the holders of watered stock receive annually \$30,000 while the tax collector receives only \$300. Under an intelligently honest government 100 toll tickets would be sold for a penny instead of a penny for one ticket.

It will be considered that our object is to present as briefly as possible some invulnerable facts which enable loose thinkers to distinguish sugar-coated plunder from just taxation.

A recent cartoon pictured a Wall street banker putting railroads into a bag, and Uncle Sam, observing him, was saying: "Mr. Banker, when you get them all in the bag, hand it over to me." A profound observer of events suggested that that banker was whispering to himself, "I propose to presently put you also into my bag, my simple-minded Uncle Sam." The cartoonist builded wiser than he knew. Bonds and stocks operate as a mortgage. It is a low estimate to say that fifteen billions of securities are outstanding which do not represent one dollar of actual investment, and that ninety per cent. of these securities are owned by less than 25,000 men. This fact means that the officials of corporations are valuable in proportion as they invent methods whereby patriotic impulse is shouted down and unscrupulous talent is subsidized. A well accredited news item, published to illustrate present prosperity, states that "the orange-growers in California received ten million dollars for their crop, and the railroads received eight millions for transporting this crop to market. The orange-growers realized probably less than six per cent. on their invested capital, while the holders of watered stock realized probably sixty per cent. on the cost of the road, after deducting government aid.

Men like Carnegie seem ambitious to apply part of their wealth to the public good, and patriotic brains should endeavor to teach such men that the greatest benefaction they can possibly bestow would be to so endow a newspaper that it will be both competent and willing to force a hearing for correct views.

J. M. MASON.

Charles Town, W. Va.



"Johnnie, your hair is wet. You've been swimming again."

"I fell in, ma'."

"Nonsense. Your clothes are perfectly dry."

"Yes'm. I know'd you didn't want me to wet 'em, so I took 'em off before I fell in."

Senator Vest's Tribute to the Dog.

One of the most eloquent tributes ever paid to the dog was delivered by Senator Vest, of Missouri, some years ago. He was attending court in a country town, and while waiting for the trial of a case in which he was interested was urged by the attorneys in a dog case to help them. Voluminous evidence was introduced to show that *the defendant had shot the dog in malice*, while other evidence went to show that the dog had attacked defendant. Vest took no part in the trial and was not disposed to speak. The attorneys, however, urged him to speak. Being thus urged he arose scanned the face of each jurymen for a moment, and said:

“Gentlemen of the Jury: The best friend a man has in the world may turn against him and become his enemy. His son or daughter that he has reared with loving care may prove ungrateful. Those who are nearest and dearest to us, those whom we trust with our happiness and our good name, may become traitors to their faith. The money that a man has he may lose. It flies away from him, perhaps when he needs it most. A man's reputation may be sacrificed in a moment of ill-considered action. The people who are prone to fall on their knees to do us honor when success is with us may be the first to throw the stone of malice when failure settles its cloud upon our heads. The one absolutely unselfish friend that man can have in this selfish world, the one that never deserts him, the one that never proves ungrateful or treacherous, is his dog. A man's dog stands by him in prosperity and in poverty, in health and in sickness. He will sleep on the cold ground, where the wintry winds blow and the snow drives fiercely, if only he may be near his master's side. He will kiss the hand that has no food to offer; he will lick the wounds and sores that come in encounter with the roughness of the world. He guards the sleep of his pauper master as if he were a prince. When all other friends desert he remains. When riches take wings and reputation falls to pieces he is as constant in his love as the sun in its journeys through the heavens. If fortune drives the master forth an outcast in the world, friendless and homeless, the faithful dog asks no higher privilege than that of accompanying him, to guard against danger, to fight against his enemies. And when the last scene of all comes, and death takes the master in its embrace, and his body is laid away

in the cold ground, no matter if all other friends pursue their way, there by the graveside will the noble dog be found, his head between his paws, his eyes sad, but open in alert watchfulness, faithful and true even in death."

Then Vest sat down. He had spoken in a low voice, without a gesture. He made no reference to the evidence or the merits of the case. When he finished judge and jury were wiping their eyes. The jury filed out but soon entered with a verdict of \$500 for the plaintiff, whose dog was shot; and it was said that some of the jurors wanted to hang the defendant.



Nonpartisan Judicial Appointments.

A purpose to select the best possible judges without regard to political bias has been evidenced by President Roosevelt in the selection of the men recently appointed by him to judicial positions. The appointment of Hon. Thomas G. Jones to the Federal court for the middle district of Alabama has justly evoked very high praise. The fact that Mr. Jones is a Democrat has not precluded his selection for this office by a Republican President. The same is true of the appointment of Frank I. Osborne to the court of private land claims. This nonpartisanship does not please everybody. Even men of great intelligence and high character are in some instances so warped by partisanship, or so fully mastered by the theory that all offices should be filled by the dominant party, that they regard any such exhibition of nonpartisanship, even in the appointment of judges, as due to amiable weakness or an impractical theory. But happily the prevalence of such views is rapidly decreasing. Nonpartisanship has for some time been making progress in respect to judicial offices. It has now extended beyond such offices to all municipal offices. The magnificent triumph of this spirit in New York City during the present month is the most conspicuous instance of this, but in a lesser degree it was illustrated in many other cities on the same day. But whatever may be said in respect to offices of any other kind, it is certain that intelligent men very generally regard the judicial office as one that ought to be removed as far as possible from partisan considerations, and many of the most uncompromising Republicans give the highest and heartiest approval to President Roosevelt's appointment of these Democrats as judges.—
Case and Comment.

Rejecting Precedents.

One of the justices of the New York supreme court is reported by the New York Tribune as using the following language:

"I have not deemed it necessary to cite authorities in support of the specific views which I have expressed. It is enough that they must commend themselves to the rational mind. It seems to be considered in some quarters that judges should not think any more on their own account; that they should spend their lives mousing through mouldy libraries in search of what other judges in a less enlightened age have said, not even upon the immediate question in hand, but upon some matter more or less distantly related. It is thought to be presumption to let one's own bucket down into the living well of reason, instead of being content to lick up from the muddy trampled earth around it the green and stagnant leakage of the past. And so the science of law, which was once deemed the perfection of human reason, is being left behind by every other science."

The specific case before the justice was one in which precedents were urged as tending to establish the right to recover \$75,000 damages for injury to a farm which was worth but \$6,500 before it was injured. In such a case the language of the justice is none too strong. There is certainly a tendency among some of our judges to follow precedents to slavishly. When a judge can see with clearness the true principle on which a case ought to be decided the law is the gainer if he has the courage to decide accordingly, notwithstanding some ancient precedent to the contrary. Here, as in multitudes of other situations, the true rule is found in the old and honored, but not entirely specific injunction: "Be bold, be bold, but not too bold." After all, the question comes back to the quality of the judge himself. A great judge will not be afraid to reject a precedent that is palpably wrong, though he may be very conservative where the matter is at all doubtful.—*Case and Comment.*

Dog Evidence.

A decision has recently been added by the Supreme Court of North Carolina to our scanty stock of decisions as to the admissibility of evidence of the behavior of a bloodhound in following the tracks of a person from the scene of a crime in order to identify the criminal. In the North Carolina case (*State v. Moore*, 39 S. E. Rep. 626) the evidence of the behavior of the dog was introduced to corroborate a witness, but it was held inadmissible because, under the circumstances in the case, the dog's behavior had no tendency to corroboration. On the general subject Cook, J., said: "This is a novel feature of evidence in our jurisprudence, and is attended with some danger and calculated to excite the superstition of some people that the exercise of that instinctive power, not possessed by human beings, is a supernatural agency in the aid of human justice, to which too great importance may be attached, and against which courts will have to guard when the occasion arises." Three cases are cited by the court in which evidence of this character has been held admissible under proper restrictions. These are *Hodge v. State*, 98 Ala. 10; *Pedigo v. Com.* (Ky. 1898), 44 S. W. Rep. 143; and *Simpson v. State*, 111 Ala. 6.

The principles upon which such evidence is admitted and the limitations to which it is subject are best stated in the Kentucky case as follows: "After a careful consideration of this case by the whole court, we think it may be safely laid down that, in order to make such testimony competent, even when it is shown that the dog is of pure blood and of a stock characterized by acuteness of scent and power of discrimination, it must also be established that the dog in question is possessed of these qualities, and has been trained or tested in their exercise in the tracking of human beings, and that these facts must appear from the testimony of some person who has personal knowledge thereof. We think it must also appear that the dog so trained and tested was laid on the trail, whether visible or not, concerning which testimony has been admitted, at a point where the circumstances tend clearly to show that the guilty party had been, or upon a track which such circumstances indicated to have been made by him. When so indicated, testimony as to trailing by a bloodhound may be permitted to go to the jury for what it is worth, as one of the circumstances which may tend to connect the defendant with the crime of which he is accused. When not so indicated, the trial court should exclude the entire testimony in that regard from the jury."—*Ex*

Lynching--From a Southern Standpoint.

BY WILLIAM HAYNE LEVEL, OF TEXAS.

The Outlook.

Last summer I happened to be spending my vacation at "Cotesworth," the country home of the late United States Senator George, about two miles from the town of Carrollton, Miss. During the time I was there I heard one day that on the night previous two defenseless old women had been done to death in a most foul and brutal fashion, and that because of it the people of the county were coming into town, and there was likely to be a lynching of several negroes who were suspected of the crime. Never before having been in the immediate neighborhood of a lynching, and wishing to learn something of the character of these repeated outbreaks, I rode to town to study the situation close at hand, hoping that something might occur which would make it possible to prevent any violence. I found that three negroes, a mother with her son and daughter, tenants of the murdered couple, had been arrested on suspicion of having committed the murder or having guilty knowledge of the facts, and were at that time confined in the county jail. I found present on the streets of the town many young farmers from the country who were carrying rifles, shot guns, or pistols, and mixed with them a few of the maturer and more conservative citizens of the county, to whom the young fellows seemed to look for direction. All of them had a serious and determined look upon their faces.

I found also that a committee of prominent men, among them the State Senator from that district, the District Attorney, and a lawyer who had several times represented the county in the Legislature, had been formed and at the hour of my arrival were at the jail examining the negroes. The committee was earnestly solicitous to prevent a lynching. It satisfied itself that those three negroes did not personally commit the crime, but knew who did, and were as yet not willing to reveal their guilty secret. Several times, both individually and as a committee, these gentlemen addressed the

mob, trying to dissuade it from violence, and pleading, in the name of humanity and for the good name of the county, to let the law take its course, the more particularly because the only apparent hope of learning who were the real murderers was involved in keeping these negroes alive. The mob was not to be dissuaded. As the authorities offered practically no resistance, the mob took the negroes, hanged them just outside the town, and riddled their bodies with bullets.

Realizing that it would be regarded as an impertinent intrusion for me to offer any suggestion, since I was an outsider; and knowing that there was no chance for me to do what well known gentlemen who had the confidence of their neighbors there failed to do, I rode away home some time before the lynching took place.

From what I learned of the whole matter of the circumstances leading up to the crime it seemed to be a case particularly demanding that the law should be permitted to take its course. It was not a question of the rape of a white woman by a negro brute. It was the assassination of the aged parents of a young white man who had previously shot to death the son of the negro mother for attempted poison. The young man was out on bail awaiting the action of the Grand Jury. But there was only one way to prevent that lynching. That was by superior force, and the constituted authorities did not offer it.

In connection with my experience and observation on the day of the lynching, I took care afterwards to discuss the case itself and the whole matter of lynching, as it obtains in the South, with some of the best and maturer and more conservative citizens of that part of the State of Mississippi, to learn whether and how far they approved lynching for crime. Of course I found some extreme men, who are good citizens in their way, who are yet very nervous over the whole question of the negro and his preponderance in their part of the State, and who assert that for any considerable crime, of whatever nature, committed against a white person by a negro, they would take the law into their own hands and shoot him down as they would a dog. These are extremists.

The greater part of the educated, conservative, thoughtful citizens approve of lynching for the rape of a white woman, but deplore the seeming necessity for it, and are groping hopelessly in the dark for some way to make lynching unnecessary. They

see that it is gradually undermining their civilization, destroying all respect for law, and, with reference to all sorts of offenses, is substituting mob law for the ancient forms which have safeguarded the liberties of the English-speaking people for centuries. They contemplate the future with something akin to terror, and confess themselves tied hand and foot to a situation from which it seems impossible to break away without hastening the very thing they fear. They believe that to turn over to the law a black fiend who has raped a defenseless white woman and made over her whole life into a living hell would inevitably tend to multiply rapes and practically put all women at the mercy of the lustful brutes.

Their explanation of the situation as it is now found in the new South may not be entirely satisfactory to the denizens of the cities and the dwellers amidst a predominant white population, but I will try to give it as it was given to me by some of the most conservative, most thoughtful, and most wise citizens of the South.

1. The natural barbarism of our human nature, whose first impulse is to wreak vengeance for an outrage, is to be always considered, for, as a matter of fact, neither individuals nor communities ever get far away from nature—and that is human nature.

2. From the earliest times *in the South* seduction has always resulted in either what is known as a "military wedding" or a homicide. The community has always supported the family of the seduced woman for killing the seducer if he would not redeem the situation as far as possible by marriage. If that was the result where there was "consent," how much more certainly would homicide be the result where there was force used to accomplish the ruin of a woman—where there was rape? A white woman would no more escape than a negro. If the white man must pay with his life for rape, how much more certainly a negro for the rape of a white woman, where in addition the revolt of all the instincts of race was involved.

3. In many of the most rural communities in the South the white population is very small compared with the negro population. The whites are really at the mercy of the blacks, if the latter but once get the notion that there is reasonable hope of escape. For there are

always enough vicious negroes in every community ready to commit the crimes of lust if they can do so and yet escape justice or vengeance. Lynching is resorted to not merely to wreak vengeance but to terrorize the negro.

4. Every one who handles large bodies of negro laborers—every one with whom I talked—believes that the average negro fears nothing as much as force. The whites believe that the moment the negro ceases to fear the power of the white man crimes will rapidly increase—crimes of the most revolting character. Among the negroes, criminals, when the crime is committed against a white man, attain to a certain heroic character, and are the objects of a certain sort of admiration which they crave and rejoice in. The conviction is general that terror is the only restraining influence with the average negro.

5. The negroes, even the best of them, will ordinarily conceal a fleeing negro, assist him in his flight, and, whenever practicable, protect him, and this without regard to the requirements of justice or the character of his defense.

6. The famous slow processes of the law and the frequent miscarriages of justice. In New Orleans a few months ago a negro insulted a refined white woman, was arrested and put upon his trial. The woman put aside her modesty and went on the witness stand and testified to the facts. The facts were outrageous and cruel. The lawyer for the defense succeeded in deferring the case some months upon a technicality, and later the brute upon conviction got only three months' sentence. One case such as that does away with the confidence in the law engendered by a hundred cases where justice is accomplished, and the mind of the people turns to lynching as the only certain remedy.

If you call their attention to the fact that lynching does not stop rape, their answer is, No, but it prevents it more than any other process would do.

The thinking men of the South realize the horror of their situation; they see that mob law is coming to be the law for all sorts of crimes, that it is beginning to be used even in private quarrels and against the whites themselves. They think it is a cruelty to serve them with condemnation, when they need the sympathy and assistance of that portion of our people who live securely

amid a predominant white population. It is easy to prescribe practically impossible premises, but you can by such means get no satisfactory or adequate result.

It will need the best wisdom and the best conscience and the best heart of our whole people, of the North and of the South, to lead us out of the darkness and the horrors of the present situation.



As Others See Us.

From the Nova Scotia Journal.

“In these times of rush and excitement, when in so many localities of the neighboring Republic criminals are summarily dealt with by Judge Lynch without any reference whatever to the Law, it is refreshing to read anything so brief and pointed as the following article from *THE BAR*, a legal journal printed at Morgantown, W. Virginia, bearing the above title. It is short, pithy, pointed, and ought to do much to allay that feverish haste which for many years has dominated in certain portions of the United States, in dealing with criminals, in direct opposition to law, and placing in the category of murderers, every man who thus lifts his hand against his fellow in the dealing out of retributive justice. The calm and dignified trial of President McKinley’s murderer reflects great credit upon the United States. If ever there was an instance when lynch law might have been justifiable, it was when a miserable wretch shot down a great and good ruler in the very act of accepting his friendly overtures. But even the President himself, with wonderful and Christ-like magnanimity called upon those surrounding him to do the man no harm. Think of it; and that noble sentiment has found its sequel in a fair and honorable trial, when every legal privilege and every legal right was extended to the notorious prisoner. Surely this is a grand example, and well may the writer of the timely article in *THE BAR* exclaim:—“Now let the lynchers and the mob retire and hide their heads in the presence of this magnificent object lesson.”

Finding Fault With Jurors.

Is it proper for a judge to scold a Grand Jury from the bench for refusing to indict a person whom the judge thinks ought to be indicted ?

This question is suggested by an occurrence on Tuesday in the Court of Quarter Sessions of Hudson county, New Jersey. In discharging the Grand Jury, Judge John A. Blair said :

"The whole Court has examined the testimony taken before you in the Sullivan case, and it is the unanimous and unqualified opinion of the Court that the evidence was such and sufficient for you to have founded an indictment. To take no notice of such negligent or wilful disregard of duty on your part, and to permit you to depart with the thanks of the public from the Court would be equivalent to an acknowledgment of an agreement between the Grand Jury and the Court not to prosecute and punish manifest violations of law.

It seems that the jurors thus addressed constituted the third Grand Jury which had refused to find an indictment against the person mentioned by Judge Blair. The foreman asked the judge for leave to say a word in response to the rebuke from the bench, but this favor was peremptorily refused.

Now, it is to be noted that the Constitution and the laws of those States in which the Grand Jury system is preserved do not leave it to the judges to say who shall be indicted. That function is conferred upon the Grand Jury; and if they determine that a man ought not to be indicted and that they will not find an indictment against him, all the judges in the State together cannot change the result.

Of course, if a Grand Jury is induced by corruption or friendship or cowardice to ignore an accusation where they ought to find an indictment, they are properly censurable by somebody; but should they be reprimanded publicly by the judge of the court in which they are serving, simply because the evidence

which he has read in a certain case convinces him that they should have indicted a person against whom no indictment has been found ? And should such a rebuke have been followed by a refusal to permit any explanation from the foreman ? Might it not well be that testimony which *reads* like the truth seemed unworthy of credit when heard from the mouths of witnesses before the Grand Jury.

It should be borne in mind that juries, whether Grand Juries or trial juries, are intended to be as independent in their sphere of action as are judges in theirs ; and, except in cases of manifest misconduct, so plain as to be beyond question, a judge has really no more right to scold a jury, or impugn their motives, or hold them up to public contempt, from his place on the bench, than they have to criticise the judge from their places in the jury box.

This tendency to "score juries," as the phrase is, needs somewhat to be repressed.—*Ex.*



The Amendments Need Amendment, But Ought to be Adopted.

EDITOR OF THE BAR :

Apropos of your recent invitation to discuss the proposed constitutional amendments, I wish to say that I concur generally in the position of **THE BAR**. It does not seem that the question of partisan politics should enter into the discussion at all, since the changes attempted are in the nature of general remedial action, and the details and methods are not definitely prescribed.

It appears, however, that they are bungling in more than one instance. Taking first the "Judicial Amendment," we find not only that there is no express provision for the length of the term of the judges of the Supreme Court, but that the amendment repeals by necessary implication without express words, a portion of section 16 of the same

article, and also a portion of the latter clause of section 38 of article 6 of the constitution.

The only serious consideration, however, is the indefinite term. But viewing the amendment in the light of the present provisions, and there being no authority conferred upon either department of the state government to fix the term, the proper and necessary construction is to hold the present length of term until changed by the people themselves. I therefore favor the adoption of this amendment with all its careless preparation.

Passing to the "Irreducible School Fund Amendment," I would suggest that an invitation be extended to all persons now living, who have held the office of State Superintendent of Schools to discuss this matter in print. The provision seems to assume that the fund has already reached the million dollar mark. As to this I am not informed. The policy of holding a large sum in reserve in this manner, really amounts to no more than the keeping of so much cash for any unusual emergency or "hard times," since the people can at any time decide to use the money for any purpose they may choose, though it would require the roundabout method of a constitutional amendment to unlock the treasury doors. Both the facts and the policy need discussion in this instance.

Coming now to the "Registration Amendment," we find it also somewhat indefinite, inasmuch as it would seem to repeal by implication alone section 43 of article 6 of the same instrument. That it does repeal this section there can hardly be any doubt, although the Legislature may enact laws carrying out its provisions, if adopted, without rendering the question pertinent. I am therefore in favor of this amendment.

Constitution making is slow work, and it is fortunate that each of these propositions is to be voted on separately. In connection with the "Irreducible School Fund Amendment," it is or may become necessary, in view of the present discussion along such lines, to consider the requirements of the same section, as to the proceeds of any taxes that may be levied on the revenues of any corporations. Let us have light upon the School Fund from some person qualified to speak. A. D. PRESTON.

Beckley, W. Va., Dec. 12, 1901.

CODE OF ETHICS

**Prepared by Judge T. P. Jacobs, of the Special Committee Appointed
by the West Virginia Bar Association.**

**To be Reported to the Next Annual Session of the Association for
Consideration and Adoption.**

The purity and efficiency of judicial administration, which under our system is largely government itself, depends as much upon the character, conduct and demeanor of attorneys in their great trust, as upon the fidelity and learning of courts, or the honesty and intelligence of juries.

“There is perhaps no profession, after that of the sacred ministry, in which a high-toned morality is more imperatively necessary than that of the law. There is certainly, without any exception, no profession in which so many temptations beset the path to swerve from the lines of strict integrity, in which so many and difficult questions of duty are constantly arising. There are pit-falls and man-traps at every step, and the mere youth at the very outset of his career, needs often the prudence of self-denial as well as the moral courage, which belong commonly to riper years. High moral principle is his only safe guide; the only torch to light his way amidst darkness and obstruction.”—*Sherwood*.

No rule will determine an attorney's duty in the varying phases of every case. What is right and proper must, in the absence of statutory rules and an authoritative code, be ascertained in view of the peculiar facts, in the light of conscience, and the conduct of honorable and distinguished attorneys in similar cases, and by the analogy to the duties enjoined by statute and the rules of good neighborhood.

The following General Rules are adopted by the Bar Association of the State of West Virginia for the guidance of its members :

DUTY OF ATTORNEYS TO COURT AND JUDICIAL OFFICERS.

1. The respect enjoined by law for courts and judicial officers is exacted for the sake of the office and not for the individual who administers it, and opinion of the incumbent, however well founded,

can not excuse the withholding of the respect due the office, while administering its functions.

2. The proprieties of the judicial station, in a great measure, disable the judge from defending himself against strictures upon his official conduct. For this reason, and because such criticisms tend to impair public confidence in the administration of justice, attorneys should, as a rule, refrain from published criticism of judicial conduct, especially in reference to causes in which they have been of counsel, otherwise than in courts of review, or when the conduct of the judge is necessarily involved in determining his removal from or continuance in office.

3. Marked attention and unusual hospitality to a judge, when the relations of the parties are such that they would not otherwise be extended, subject both judge and attorney to misconstruction and should be sedulously avoided. A self-respecting independence in the discharge of the attorney's duties, which at the same time does not withhold the courtesy and respect due to the judge's station, is the only just foundation for cordial, personal and official relations between Bench and Bar. All attempts by means beyond these to gain special personal consideration and favor of a judge are disreputable.

4. Courts and judicial officers, in the rightful exercise of their functions, should always receive the support and countenance of attorneys against unjust criticism and popular clamor; and it is an attorney's duty to give them his moral support in all proper ways, and particularly by setting a good example in his own person of obedience to law,

5. The utmost candor and fairness should characterize the dealings of attorneys with the courts and with each other. Knowingly citing as authority an overruled case, or reading a repealed statute as in existence; knowingly misquoting the language of a decision or a text-book; knowingly mis-stating the contents of a paper, the testimony of a witness, or the language or arguments of the opposite counsel; offering evidence which it is known the court must reject as illegal, to get it before the jury under the guise of arguing its admissibility, and all kindred practices are deceits and evasions unworthy of attorneys.

Purposely concealing or withholding in the opening arguments positions intended finally to be relied on, in order that the opposite counsel may not discuss them, is unprofessional. Courts and juries look with disfavor on such practices and are quick to suspect the weakness of the cause which has need to resort to them.

In the argument of demurrers, admission of evidence, and other questions of law, counsel should carefully refrain from "side bar" remarks and sparring discourse to influence the jury or bystanders. Personal colloquies between counsel tend to delay and promote unseemly wrangling and ought to be discouraged.

6. Attorneys owe it to the courts and the public whose business the courts transact, as well as to their own clients, to be punctual in attendance on their causes; and whenever an attorney is late he

should apologize or explain his absence.

7. One side must always lose the cause, and it is not wise or respectful to the court for attorneys to display temper because of an adverse ruling.

DUTIES OF ATTORNEYS TO EACH OTHER, TO CLIENTS AND TO THE PUBLIC.

8. An attorney should strive at all times, to uphold the honor, maintain the dignity and promote the usefulness of the profession, for it is so interwoven with the administration of justice that whatever redounds to the good of one advances the other, and the attorney thus discharges, not merely an obligation to his brothers, but a high duty to the State and his fellow-man.

9. An attorney should not speak slightly or disparagingly of his profession, or pander in any way to the unjust popular prejudices against it; and he should scrupulously refrain at all times and in all relations of life, from availing himself of any prejudice or popular misconception against lawyers, in order to carry a point against a brother attorney.

10. Nothing has been more potential in creating and pandering to popular prejudice against lawyers as a class, and in withholding from the profession the full measure of public esteem and confidence which belong to the proper discharge of its duties than the false claim, often set up by the unscrupulous, in defense of questionable transactions, that it is an attorney's duty to do everything to succeed in his client's cause.

An attorney "owes entire devotion to the interest of his client, warm zeal in the maintenance and defence of his cause, and the exertion of the utmost skill and ability," to the end that nothing may be taken or withheld from him save by the rules of law legally applied. No sacrifice or peril, even to loss of life itself, can absolve from the fearless discharge of this duty. Nevertheless, it is steadfastly to be borne in mind that the great trust is to be performed within and not without the bounds of the law which creates it. The attorney's office does not destroy man's accountability to his Creator, or lessen the duty of obedience to law and the obligation to his neighbor; and it does not permit, much less demand, violation of law or any manner of fraud or chicanery for the client's sake.

11. Attorneys should fearlessly expose before the proper tribunals corrupt or dishonest conduct in the profession, and there should never be a hesitancy in accepting employment against an attorney who has wronged his client.

12. An attorney appearing or continuing as private counsel in the prosecution of a crime of which he believes the accused innocent, forswears himself. The State's attorney is criminal if he presses for a conviction, when upon the evidence he believes the prisoner innocent. If the evidence is not plain enough to justify a *nolle prosequi*, a public prosecutor should submit the case, with such comments as are pertinent, accompanied by a candid

statement of his own doubts.

13. An attorney cannot reject the defence of a person accused of a criminal offense because he knows or believes him guilty. It is his duty by all fair and lawful means to present such defenses as the law of the land permits, to the end that no one may be deprived of his life or liberty but by the process of law.

14. An attorney must decline in a civil cause to conduct a prosecution, when satisfied that the purpose is merely to harrass or injure the opposite party, or to work oppression and wrong.

15. It is a bad practice for an attorney to communicate or argue privately with the judge as to the merits of his cause.

16. Newspaper advertisements, circulars and business cards, tendering professional services to the general public are proper, but special solicitation of particular individuals to become clients is disreputable. Indirect advertisements for business, by furnishing or inspiring editorials or press notices regarding causes in which the attorney takes part, the manner in which they were conducted, the importance of his positions, the magnitude of the interests involved, and all other like self-laudation is of evil tendency and wholly unprofessional.

17. Newspaper publications by an attorney as to the merits of pending or anticipated litigation, call forth discussion and reply from the opposite party, tend to prevent a fair trial in the Courts, and otherwise prejudice the due administration of justice. It requires a strong case to justify such publications, and when proper it is unprofessional to make them anonymously.

18. When an attorney is witness for his client, except as to formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the cause to other counsel. Except when essential to the ends of justice, an attorney should scrupulously avoid testifying in court in behalf of his client as to any matter.

19. Assertions sometimes made by counsel in argument of a personal belief of the client's innocence or the justice of his cause, are to be discouraged.

20. It is indecent to hunt up defects in titles and the like, and inform thereof, in order to be employed to bring suit; or to seek out a person supposed to have a cause of action, and endeavor to get a fee to litigate about it. Except where the ties of blood, relationship or trust make it an attorney's duty, it is unprofessional to volunteer advice to bring a law-suit. Stirring up strife and litigation is forbidden by law and disreputable in morals.

21. Communications and confidence between clients and attorney are the property and secrets of the client, and can not be divulged except at his instance; even the death of his client does not absolve the attorney from his obligation of secrecy.

22. The duty not to divulge the secrets of clients extends further than mere silence by the attorney, and forbids accepting retainers or employment afterwards from others involving the .

client's interest in the matters about which the confidence was reposed. When the secrets or confidence of a former client may be availed of or be material in a subsequent suit, as a basis of any judgment which may injuriously affect his rights, the attorney can not appear in such cases without the consent of his former client.

23. An attorney can never attack an instrument or paper drawn by him for an infirmity apparent on its face ; nor for any other cause where confidence has been reposed as to the facts concerning it. Where the attorney acted as a mere scrivener, and was not consulted as to the facts, and, unknown to him, the transaction amounted to a violation of the laws, he may assail it on that ground in suits between third persons, or between parties to the instrument and strangers.

24. An attorney, openly and in his true character, may render purely professional service before committees regarding proposed legislation, and in advocacy of claims before departments of the government, upon the same principles of ethics which justify his appearance before the courts ; but it is immoral and illegal for an attorney so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means other than those addressed to the reason or understanding, to influence action.

25. An attorney can never represent conflicting interests in the same suit or transaction, except by express consent of all concerned, with full knowledge of the facts. Even then, such supposition is embarrassing, and ought to be avoided. An attorney represents conflicting interests, within the meaning of the rule, when it is his duty, in behalf of one of his clients, to contend for that which duty to other clients in the transaction requires him to oppose.

26. "It is not desirable professional reputation to live and die with—that of a rough tongue, which makes a man to be sought and retained to gratify the malevolent feeling of a suitor, in hearing the other side well lashed and villified,"

27. An attorney is under no obligation to minister to the malevolence or prejudice of a client in the trial or conduct of a cause. The client can not be made the keeper of an attorney's conscience in professional matters. He can not demand as of right that his attorney shall abuse the opposite party, or indulge in offensive personalities. The attorney under the solemnity of his oath must determine for himself whether such a course is essential to the ends of justice, and therefore justifiable.

28. Clients, and not their attorneys, are the litigants, and whatever may be the ill feeling existing between clients it is unprofessional for attorneys to partake of it in their conduct and demeanor to each other, or to suitors in the case.

29. In the conduct of litigation and the trial of causes, the attorneys should try the merits of the cause, and not try each other. It is not proper to allude to, or comment upon, the personal history or mental or physical peculiarities or idiosyncrasies of

opposite counsel. Personalities should always be avoided, and the utmost courtesy always extended to an honorable opponent.

30. As to incidental matters pending the trial, not affecting the merits of the cause, or working substantial prejudice to the rights of the client, such as forcing the opposite attorney to trial when he is under affliction or bereavement; forcing the trial on a particular day to the serious injury of the opposite attorney, when no harm will result from a trial at a different time; the time allowed for signing a bill of exceptions, crossing interrogatories and the like, the attorney must be allowed to judge. No client has a right to demand that his attorney shall be liberal in such matters, or that he should do anything therein repugnant to his own sense of honor and propriety; and if such a course is insisted on the attorney should retire from the cause.

31. The miscarriage to which justice is subject and the uncertainty of predicting results, admonish attorneys to beware of bold and confident assurance to clients, especially where the employment depends upon the assurance and the case is not plain.

32. Prompt preparation for trial, punctuality in answering letters and keeping engagements, are due from an attorney to his client, and do much to strengthen their confidence and friendship.

33. An attorney is in honor bound to disclose to the client at the time of retainer all the circumstances of his relation to the parties, or interest or connection with the controversy which might justly influence the client in the selection of his attorney. He must decline to appear in any cause where his obligations or relations to the opposite party will hinder or seriously embarrass the full and fearless discharge of all his duties.

34. An attorney should endeavor to obtain full knowledge of his client's cause before advising him, and is bound to give him a candid opinion on the merits and probable result of his cause. When the controversy will admit of it, he ought to seek to adjust it without litigation, if practicable.

35. Money or other trust property coming into the possession of an attorney should be promptly reported, and never commingled with his private property or used by him, except with the client's knowledge and consent.

36. Attorneys should, as far as possible, avoid becoming either borrowers or creditors of their clients; and they ought scrupulously to refrain from bargaining about the subject matter of the litigation, so long as the relation of attorney and client continues.

37. Natural solicitude of clients often prompts them to offer assistance of additional counsel. This should not be met, as it sometimes is, as evidence of want of confidence; but, after advising frankly with the client, it should be left to his determination.

38. Important agreements affecting the rights of clients, should, as far as possible, be reduced to writing: but it is dishonorable to avoid performance of an agreement fairly made, because not reduced to writing, as required by rules of court.

39. Attorneys should not ignore known customs or practice of

the bar of a particular court, even when the law permits, without giving the opposite counsel timely notice.

40. An attorney should not attempt to compromise with the opposite party without notifying his attorney if practicable.

41. When attorneys jointly associated in a cause can not agree as to any matter vital to the interest of their client, the course to be pursued should be left to his determination. The client's decision should be cheerfully acquiesced in, unless the nature of the difference makes it impracticable for the attorneys to co-operate heartily and effectively, in which event it is his duty to ask to be discharged.

42. An attorney ought not to engage in discussion or arguments about the merits of the case with the opposite party without notice to his attorney.

43. Satisfactory relations between attorney and client are best preserved by a frank and explicit understanding at the outset as to the amount of the attorney's compensation, and, where it is possible, this should always be agreed on in advance.

44. In general, it is better to yield something to a client's dissatisfaction at the amount of the fee, though the sum be reasonable, than to engage in a lawsuit to justify it, which ought always to be avoided, except as a last resort to prevent imposition and fraud.

45. In fixing fees the following elements should be considered : 1st—The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to properly conduct the cause. 2d—Whether the particular case will debar the attorney's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that the attorney would otherwise be employed, and herein of the loss of other business while employed in the particular case, and the antagonism with other clients growing out of the employment. 3d—The customary charges of the Bar for similar services. 4th—The real amount involved and the benefit resulting from the service. 5th—Whether the compensation was contingent or assured. 6th—Is the client a regular one, retaining the attorney in all his business? No one of these considerations is in itself controlling. They are mere guides in ascertaining what the service was really worth ; and in fixing the amount it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.

46. Contingent fees may be contracted for, but they lead to many abuses, and certain compensation is to be preferred.

47. Casual and slight services should be rendered without charge by one attorney to another in his personal cause ; but when the service goes beyond this, an attorney may be charged as other clients. Ordinary advice and services to the family of a deceased attorney should be rendered without charge in most instances, and where the circumstances make it proper to charge, the fees should generally be less than in cases of other clients.

48. Witnesses and suitors should be treated with fairness and kindness. When essential to the ends of justice to arraign their conduct or testimony, it should be done without villification or unnecessary harshness. Fierceness of manner and uncivil behavior can add nothing to the truthful dissection of a false witness' testimony, and often rob deserved strictures of proper weight.

49. It is the duty of the court and its officers to provide for the comfort of the jurors. Displaying special concern for their comfort and volunteering to ask favors for them while they are present—such as frequent motions to adjourn trials, or take a recess, solely on the ground of the jury's fatigue or hunger, the uncomfortableness of their seats or the court room, and the like—should be avoided. Such intervention of attorneys, when proper, ought to be had privately with the court, whereby there will be no appearance of fawning upon the jury, nor ground for ill-feeling of the jury toward the court or opposite counsel if such requests are denied. For like reasons one attorney should never ask another in the presence of the jury to consent to its discharge or dispersion; and when such a request is made by the court, the attorneys, without indicating their preferences, should ask to be heard after the jury withdraws. And all propositions from counsel to dispense with argument should be made and discussed out of the hearing of the jury.

50. An attorney ought never to converse privately with jurors about the case, and must avoid all unnecessary communication, even as to matters foreign to the cause, both before and during the trial. Any other course, no matter how blameless the attorney's motives, gives color for imputing evil designs, and often leads to scandal in the administration of justice.

51. An attorney assigned as counsel for an indigent prisoner ought not to ask to be excused for any light excuse, and should always be a friend to the defenceless and oppressed.



Once when Judge Gary, of Chicago, was trying a case he was disturbed by a young man who kept moving about in the rear of the room, lifting chairs and looking under things.

"Young man," Judge Gary called out, "you are making a great deal of unnecessary noise. What are you about?"

"Your honor," replied the young man, "I have lost my overcoat, and am trying to find it."

"Well," said the venerable jurist, "people often lose whole suits in here without making all that disturbance."



When a man buys his wife a carriage, and finer clothes than he can afford, other women call it being "good" to her.

Romantic Cuban Justice.

BY GEORGE H. WESTLEY

In the Green Bag.

No governor general of Cuba stands out so prominently in the history of the island as Don Miguel Tacon, who held the reins of Spanish government there from 1834 to 1838. The old Cubans who remember Tacon say that he was *un hombre muy grande*; but it cannot be said that they regard his memory with affection, for his policy was one of violence and he ruled with a hand of iron. There was this much to his credit, however, that he had but one interpretation of the law for the rich and the poor, for the humblest peasant and the wealthiest grandee.

While acting in his judicial capacity Tacon rarely tempered justice with mercy, but it is said that he took a keen pleasure in coloring it, whenever possible, with romance. And that brings me to the story.

In Havana, in Tacon's time, there was a beautiful young Creole girl, named Miralda Estalez, who kept a little cigar shop, frequented by the young men of the town who loved a choicely made and superior cigar. Miralda was an orphan, having lost her father and mother before she was sixteen. In manner the girl was delicate and refined, yet cheerful, and though she was paid constant attention by her rich and gay young patrons, she never for a moment allowed her head to be turned by their flatteries, or was unfaithful to Pedro Mantanez, the young boatman who was her accepted lover.

One of Miralda's customers was Count Almonte, the gayest cavalier in Havana. He had conceived a violent passion for his fair attendant, and one day finding her alone, he took the opportunity to declare it, beseeching her to go with him to his magnificent mansion at Cerito in the suburbs, where he would surround her with every luxury she could possibly desire, except of course the luxury of being a countess. Miralda, true to her womanhood and her lover, scorned his

appeal, and bade him never again insult her by entering her shop. Almonte went away confounded, but nevertheless determined that by fair means or foul the girl should be his.

On the following afternoon a file of soldiers halted at the door of the little cigar shop, and the lieutenant, entering, ordered the frightened girl to follow him immediately.

"What for?" she asked. "By whose orders?"

"The governor general's."

Not daring to oppose such high authority, Miralda closed her shop and went with the lieutenant. She was not taken to prison, however, but, what was to her far worse, was conveyed to Almonte's castle at Cerito. The Count was there to receive her, and, smiling triumphantly, he assured her that she would be kept a prisoner until she acceded to his desires.

What was the surprise of the lover Pedro, that evening, to find the little cigar shop closed, and Miralda nowhere to be found. He instantly sought for some clue, and obtaining one, he traced it up until he discovered where the girl was confined. Then, to make sure that she was not there of her own free will, he disguised himself as a friar of the order of San Felipe, and, applying at a favorable moment, he succeeded in getting in and securing an interview with his inamorata, who received him with open arms.

The next thing was to get Miralda out of the Count's clutches, and this was not easy. Almonte was rich and powerful, and Pedro was only a poor boatman. Nevertheless the young lover was not discouraged; he had heard that Tacon loved justice, and he determined to go to him at once. After some delay he obtained an audience and presented his case.

"Is Miralda your sister?" asked the governor, as Pedro finished his story.

"She is my betrothed," replied Pedro.

Tacon then bade him come nearer, and holding up a crucifix, commanded him with a look that penetrated to his very soul, to swear to the truth of what he had said. Pedro knelt, kissed the cross and swore. Tacon then told him to wait in the

adjoining room, with the assurance that the matter would soon be attended to. Two hours later Tacon had the Count and Miralda before him.

"Count Almonte," said the governor you adopted the uniform of the guards for your own private purposes upon this young girl, did you not?"

"Excelencia, I cannot deny it."

"Declare, upon your honor, Count Almonte, whether she is unharmed whom you have thus kept prisoner."

"Excelencia, she is as pure as when she first entered beneath my roof," was the reply.

Tacon turned to an attendant and sent him to the church near by for a priest, who in a few moments entered.

"Holy father," said Tacon, "you will bind the hands of this Count Almonte and Miralda Estalez together in the bonds of wedlock."

"Excelencia!" exclaimed the Count in amazement; while the girl and her lover exchanged glances of consternation.

"Not a word, Senor; it is your part to obey."

"My nobility, Excelencia!"

"Is forfeited!" said Tacon.

Count Almonte knew the governor too well to offer further protest, and he doggedly yielded in silence. Poor Pedro, not daring to speak, was half-crazed to see the prize he had so long coveted thus about to be torn from him. Miralda stood as if bereft of her senses, and before she had fully realized what was taking place, the ceremony was over.

Tacon's next move was to summon the captain of the guard, to whom he gave a hastily written order. Miralda and Pedro were directed to remain, and Almonte was commanded to return to his castle.

For half an hour the lovers sat there mystified, while Tacon went on quietly with other business, as if he had forgotten their existence. Presently the officer of the guard returned.

"Is my order executed?" said Tacon.

"Yes, Excelencia ! Nine bullets passed through the Count's body as he rode round the corner of the street you mentioned."

Tacon then turned to the priest and said, "You will see legal announcement is made of the marriage just performed here, as well as the legal announcement of the death of Count Almonte, with the addition that his widow becomes sole heiress to his property and his name."

Miralda and Pedro, greatly relieved, were then dismissed with the benevolent injunction to attend to the further prosecution of the case for themselves.



Gagging a Prisoner.

The *Solicitors' Journal* (London) of October 19, 1901, contains the following item of a trial recently held in England:

"An extraordinary scene occurred at the West Riding Quarter Sessions, held at Wakefield, on Monday. A prisoner indicted for horse stealing, on entering the dock, commenced to shout and abuse the members of the court and otherwise act in a most violent and noisy manner. A plea of not guilty having been extracted from him with some difficulty, he continued shouting with such persistence that it was quite impossible for the case to be heard. He was therefore taken down to be medically examined. Later in the day, the doctor having reported that he was of sound mind, the case was proceeded with. The prisoner again created such a disturbance that no other voice could be heard in court. It being absolutely impossible to go on otherwise, he was gagged and handcuffed while the evidence was given, and eventually received a sentence of seven years' penal servitude. He utilized every opportunity which was afforded him to renew his violent conduct, and refused to address the court or the jury. As it was a charge of felony the court would not send the prisoner down, it being pointed out that, according to Archbold no trial for felony can be had except in the presence of the prisoner. The reason for this is stated to be that he is given in charge to the jury. A charge of misdemeanor may be tried, although the accused be not present, if he has previously pleaded. In a case before Wills, J. (*R. v. Berry*, 104 L. T. J., 110), it is stated that if a prisoner creates a disturbance the trial may go on in his absence. In the absence of any direct ruling as to a charge of felony, it can hardly be suggested that in the West Riding case the action of the Bench was not, at least, the outcome of common sense, though objection might be taken to the fact that the prisoner's opportunities for cross-examination were somewhat limited. If a prisoner may not be subjected to restraint, it would be possible for any accused person by violent conduct to delay his trial almost indefinitely."

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Jurisdiction of Courts

By TIMOTHY BROWN, of the Iowa Bar.

That jurisdiction must in fact exist, and a want of it may always be shown even against a recital of record to the contrary.

That jurisdictional presumptions, when a court is acting within the scope of its authority, apply to an inferior as well as to a superior court.

The law requires due process of law by proper notice, or citation, to the defendant to appear and defend in order to bind him by a personal judgment, yet heretofore it has been held erroneously that a recital that the court found due service had been made, such recital, though false, was declared a verity when made by a court of record, and the silence of the record raised a conclusive presumption of its verity.

This work holds that a lack of jurisdiction may always be shown to impeach such false recital, and that a lack of jurisdiction may be shown to contradict the record recitals.

CHAPTER HEADINGS.

- I.—Source of Jurisdiction.
- II.—Courts Represent Sovereignty
- III.—Nature, Character and Powers of Courts.
- IV.—Venue of Actions.
- V.—Actions—Where Brought.
- VI.—Process.
- VII.—Service of Process by Publication.
- VIII.—Jurisdiction in Proceedings in Rem.
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- X.—Criminal Jurisdiction.

- XI.—Habeas Corpus.
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- XIV.—Jurisdiction in Attachment and Garnishment.
- XV.—Jurisdiction in Taxation.
- XVI.—Mandamus.
- XVII.—Prohibition.
- XVIII.—Quo Warranto.
- XIX.—Jurisdiction in Certiorari.
- XX.—Jurisdiction in Special Proceedings.
- XXI.—Jurisdiction in Equity.

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THE BAR

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THE BAR.

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THE BAR is furnished at the nominal rate of \$1.00 a year, which is less than the cost of publication, and we would like to have the name of every lawyer in the State on our subscription list.

THE first need of our country," said Lord Rosebery in his Rectorial Address before the University of Glasgow in 1900, "is the want of men. We want men for all sorts of high positions—first-rate men if possible; if not, ~~as~~ nearly first-rate as may be." There is another kind of men whom Lord Rosebery did not mention, but who are no less essential to the welfare of a democracy—men who are capable of recognizing first-rate men, and choosing them for the ruling classes.



LAST week a prisoner, gray-haired and haughty, was arraigned in the police court at Boston charged with stealing an overcoat. The coat had been made by a tailor for the prisoner, who offered in payment a check drawn on a bank in South Carolina. When the check was presented for payment it was found that there were no funds at the bank to meet it, and it was discovered later, on investigation, that the prisoner had pawned the overcoat. When called upon to make his defense the prisoner, who proved to be a former governor of South Carolina, arose and said:

It has been given out to the public that I was a natural born animal. But in 1872 I was chief magistrate of one of the proudest States in the Union—South Carolina. I was driven by social ostracism, in spite of my lofty position and in spite of my college day associations, to the degrading use of morphine. From that I soon went to the use of opium. I lost all my social prestige, and when, in 1876, the Republican Party fell, I fell, too.

The former governor of South Carolina was sentenced to Deer Island for four months.

THE late Henry Russell, the veteran English composer of of "cheer, Boys, cheer," and of more than 800 other songs which were popular in their day, had many amusing experiences when he sang his ballads on various occasions. Once, after rendering "Woodman, Spare That Tree," a gentlemam rose in the gallery and asked:

"Was the tree spared?"

On being answered in the affirmative, he, with a sign of heartfelt relief, exclaimed:

"Thank God for that!"

After singing the song of "The Dog Carlo," who jumped off an Atlantic liner and saved a child's life, Russell was gravely waited upon by a couple of Yorkshire miners, who begged him for a pup.



A NEW mode of opening court has been adopted by the U. S. Supreme Court. It has heretofore been customary for the lictor preceding each Judge to knock on the door and call out something like "Hats off," to bring about order in the room as the Judge enters. Here's the way things start in now:

As the Judge approaches the court room the officer at the door will knock on same and announce "The Justice of the Supreme Court."

If a jury is in the box the crier will say to the foreman in a low tone as the Judge approaches the bench "Jurors will please rise."

Officers will refrain from making announcements, as "Hats off" and the like, except when really necessary.

The custom of opening and closing court by calling out "Oyez!" "O Yis!" or words to that effect has not yet been tampered with.

Contempt in Kentucky

A CONTEMPT case that will interest the bar and the bench alike is that of *Ex parte Stricker* (109 Federal Rep. 145). The facts of the case are brief and simple. Stricker was a Cincinnati lawyer, who also practiced in Covington, Ky. Arriving at the latter place to try a case in which he was retained, he found the judge was absent in Chicago, and had telegraphed the sheriff to adjourn all business until a future day. Pursuant to the provisions of a Kentucky statute, the attorney requested the clerk to hold an election for a special judge to try the case. The clerk refused. After the return of the regular judge, the case proceeded to trial. In the midst of the trial the judge sent for the clerk, and inquired who the Cincinnati attorney was who had requested the election of a special judge while he was absent in Chicago. The attorney stood up, and replied in a respectful manner that he was the man. He was ordered to sit down, which he did, and the case proceeded until the noon recess, when the judge, without further proceedings, announced that Stricker was fined \$25 for contempt of court, and the sheriff would take said Stricker in custody until the fine was paid. The petitioner applied to the United States District court for a writ of habeas corpus. Judge Evans, in his opinion, holds that a person who is summarily adjudged guilty of contempt without a hearing for an act not committed in the presence of the court, and who, in consequence thereof is imprisoned for non-payment of the fine imposed, is deprived of his liberty without due process of law, in violation of the fourteenth Amendment to the Constitution of the United States.

The Proposed Amendments to the State Constitution.

LORD BACON recommended that all important affairs be committed first to Argus with a hundred eyes, and afterwards to Briareus with a hundred arms. For, he remarks, things will have their first or second agitation. If they are not first tossed upon the arguments of counsel, they will be afterward tossed upon the uncertain waves of fortune.

This is especially applicable to amendments of the organic law—the law that is designed to be permanent and fixed, and not subject to change even at the will of the legislature, or even when it is found to be bad in its results and practically subversive of the very purpose for which it was made.

Nevertheless there are a number of proposed amendments to the constitution now before the people of this State for adoption, that have apparently been drawn with less care and received less attention from the Legislature than an ordinary statute, say, for regulating the catching of fish, the protection of a skunk, or to prohibit a woman wearing a high hat in a theater. Some overworked, hasty, or inexperienced legislator, who was not learned in the law, or even in grammar, took a paper pad on his knee, scratched off an amendment supposed to be needed to the organic law, tossed it over to his committee, and the committee guessing at its purpose, agreed that it ought to be done, reported it to the legislature with recommendation that it be adopted, and no member finding in it any special or peculiar application to his locality, it was adopted without discussion and without opposition as a matter of course.

At least this seems to be about the history of some of the proposed amendments, judging from their construction, their language and the general vagueness of their meaning.

We instance what is known as the the Judicial Amendment

and we call attention to an analysis of this amendment by Col. Fast, whose article appears on another page. We think Col. Fast's criticism of this amendment is well founded in every particular and even stops short of all the counts that might be included in an indictment against it. And we venture to say that there is no lawyer who, after reading Col. Fast's article, will not instinctively revolt against interjecting this blunderbus of an amendment into our organic law.

It is a shame that a proposition so loosely framed, and involving such glaring incogruities should, in the first instance, be proposed as a part of the organic law, and in the second place that it should be formally submitted to the people for adoption. The people have a right to assume that a measure of such a character has been carefully digested and framed to accomplish a plain purpose. The people have no time or talent for a patient or technical consideration of such a proposition; and even the newspaper press seeks only to advise of the purpose of the amendments. Were it not that this journal feels it to be its province and part of its duty to discuss them from a legal standpoint the mischief in these amendments would go undiscovered and undisclosed until they had gone beyond recall.

The question remains: What are we going to do about it?

The judicial amendment is the one in which the Profession has a special and peculiar interest. The necessity for another judge on the Supreme bench is immediate and urgent. The need for a respectable compensation for the judiciary is vital and cannot be postponed without serious detriment.

There are but two courses open: The first is to adopt the amendment and take the chances of it accomplishing or failing to accomplish its purposes, and, in the latter event, waiting the time necessary to have it interpreted by the Supreme court, and then, upon an adverse decision going back to the legislature and beginning over again; or secondly in rejecting the amendment at the polls and going directly to

the legislature for a new amendment and another vote at the polls.

In the meantime it behooves the bar of the state to choose between these alternatives and act as a body. We continue to invite discussion of any and all these amendments to which the columns of THE BAR will be freely open till the day of the election.



Put on Probation.

A SYSTEM of probationary punishments has been in vogue in the criminal courts of Boston for some years, which seems to have developed into an established order.

Within the past ten years about forty thousand arrested persons have been put on probation with excellent results. It is thirty years since the experiment was first tried in Boston under a volunteer system. In 1878 it was made official; thirteen years ago it was made mandatory. Now the State has seventy probation officers, fifteen of them in the city of Boston eight in the Municipal Court, six of them men and two women. The latter have charge of the girls and women who are arrested. They must be prepared to give the judge information upon which he can base a decision as to the wisdom of placing offenders on probation. Juveniles are tried every day at a special hour when adults, except those directly interested, are excluded. There is great advantage in the prompt disposition of children's cases. They are not even placed in institutions, much less in jail: but their cases are disposed of at once, and they either go out on probation or are sent to industrial schools. Women placed on probation are visited by the probation officers in their homes, taught domestic occupations, and advised about their children. Thirty per cent of the women arrested and put on probation since 1896 have never been re-arrested.

Poking Fun At Us.

IT seems to be a never failing source of inspiration for our British brethren of the Profession, at their banquets and after-dinner speeches to poke fun at the habits and methods of the American lawyer.

They tell terrible stories, it is said, of "visitors walking straight into the private room of an American lawyer without being announced; of the multiplicity of things which an American lawyer is supposed to know without in fact knowing any of them well; how he may be called upon to advise on a question of commercial law, to conduct a case before a jury, to draw a will, advise a trustee on his own responsibility, arrest a ship in an admiralty suit or prosecute a forger; and then, as the most shocking thing of all, they tell of American counsel who are in the railroad or construction or biscuit business, thus combining the functions of a general manager and a legal adviser. They excuse the condition with us on the ground that it is simply a case of necessity, as a general stores in a country village may be pardoned, admitting that the division of labor is a plant of slow growth. But they are sure that the separation of the legal profession into two branches is not a relic of barbarism or a form of trade unionism, but a result of the tendency to division of labor which accompanies a high state of development.



THE hospitable spirit of the Clarksburg bar will not be surpassed by any bar in the State as hosts of the State Bar Association. That bar is made up of lawyers and gentlemen "well shaken before taken."

Is An Unwritten Decision of our Appellate Court Constitutional?

BY Art VIII sec. 5 of the constitution of West Virginia, it is provided:

“When a judgment or decree is reversed or affirmed by the Supreme Court of Appeals, every point fairly arising upon the record shall be considered and decided, and the reasons thereof shall be concisely stated in writing. . . . and it shall be the duty of the court to prepare a syllabus of the points concurred in by three of the judges.”

There can be no doubt as to what this means, except that there may be no question in a given case as to what is a point fairly arising upon the record.

When the Court determines that a point does fairly arise upon the record, it shall be considered and decided, and the reasons for the decision shall be stated in writing (“therefor”).

The purpose of this section and its usefulness rest on several grounds. It demands consideration of the record by each judge, and enjoins a written statement of the reasons for the conclusions reached.

We know the written statement as the “opinion”, as distinguished from the syllabus which sets forth the points adjudicated. The syllabus must find its support in the opinion, and to prevent a misapprehension as to what points are covered by the opinion, the court is required to specify them, and not leave a reporter to gather them according to what he may think was adjudicated, as distinguished from the obiter dicta.

Decisions thus rendered are of binding authority, under section 4, and the reasoning of the Court is explanatory and illustrative of the doctrine established.

Now, suppose that under this provision, a judge dissents.

He is not required to state his reasons, and if he does, he only makes more plain what the majority of them has settled. He may demonstrate that they are wrong, but his opinion is known to be against what the others have determined. He cannot change the result, which is found probably in the head note, and the reasons for the actual decision are required to be stated in the majority opinion.

How can any one so read this organic law as to imagine that the Court can refuse to write any reasons?

Suppose we should find a case stated, and then a mere note in the report (as occurs in some jurisdictions) "Per curiam, reversed," or "affirmed".

Obviously, this would be in violation of the law. The losing party would think that his rights had not been considered, and that no reasons could be assigned for his defeat. His counsel would respectfully tell him that the Court had made a serious oversight of duty, that the Constitution had guarded his interests by commanding the Court to take the pains to be exact, and to submit to the public in a permanent record, the grounds of its judgment, etc.

But if a decision without assigning any reasons for it, is unconstitutional, what can we say when we read an able opinion, closely argued and supported by authority, written by a judge who concludes thus—

"It follows from what I have said, in the thirty preceding pages, that the court below erred in the application of the statute of limitation, and in the third instruction given to the jury, and this judgment should be reversed—*But* the majority of the court wholly dissent from my views and therefore we affirm the judgment."

The reasons given are not *for* the decision, but all *against* it. The majority write nothing in support of their holding; they have not dug it out with pen and labor, nor weighed all the authorities, as probably did the judge who wrote

critically, expecting his work to pass under the criticism of ages to come. More than once a judge appointed to write the views of an entire court, has come back to his brothers with an opinion to which he was impelled on close scrutiny, and this opinion wholly changed the result.

When we remember the object of these provisions, the effort to ensure full consideration of every point, as matter of justice to the particular litigants, and as safe guidance for future reference—we must regret when all these safeguards are thrown away, that a reader of the opinion will most surely be misled in looking to that case for a point settled in the jurisprudence of the State.



A REPORT has been issued by the Census Bureau at Washington relating to the population of the United States as a whole, including all outlying possessions. The report is based upon the census of the year 1900, and brings up the total to 84,233,069. The items which make up this total are as follows: Continental United States, or United States proper, 75,994,575; Philippines, 6,961,339, being the estimate of the statistician to the Philippine Commission; Porto Rico, 953,243; Hawaii, 154,001; Alaska, 63,592; Guam, 9,000; American Samoa, 9,100; persons in the military and naval service of the United States outside of the territory of the United States proper, 91,219.



THE expense incurred in the trial and conviction of Czolgosz, the assassin of President McKinley, was \$1,799,50. Of this sum \$500 was paid the attorney who defended him, \$1,000 to the scientists who examined him, \$145 to the deputies who guarded him, \$36 for pictures taken, and there is a bill of \$118,50 for the transporting of Czolgosz and his guards to Auburn.

The School Fund Amendment.

WE have had frequent inquiries about the proposed constitutional amendment relating to the School Fund; but have been unable to find anyone who is disposed to discuss it. We take from the last *School Journal* the subjoined article by Supt. Miller, which gives a very fair exposition of the history of the fund and the effect that the adoption of the amendment will have upon it:

"The following is the fourth proposed amendment to the Constitution of West Virginia, which, if adopted at the next general election in November 1902, will limit the school fund to one million dollars.

"The accumulation of the School Fund provided for in section four of Article XII, of the Constitution of this State, shall cease upon the adoption of this amendment, and all the money to the credit of said fund over one million of dollars, together, with the interest of said fund, shall be used for the support of the Free Schools of this State. All money and taxes heretofore payable into the Treasury, under the provisions of the said section four to the credit of the School Fund, shall be hereafter paid into the Treasury to the credit of the general school fund for the support of the Free Schools of the State."

As there seems to be a good deal of misapprehension throughout the State in respect to this fund, commonly known as the "Irreducible School Fund," we have thought well to give a few facts as to the origin, growth and present condition of the fund and to invite further brief discussion in the columns of the *Journal* as to the proposed amendment.

This fund had its origin in the sum of one hundred and twenty thousand dollars which was a part of the Literary Fund of Virginia, and which sum was a portion of the stock of banks located in that part of Virginia which became a part of the new State. From an examination of our Constitution, it appears

that the sources from which, and by which, the said fund has been, or may be, increased are nine in number.

Some of these sources have never produced anything; others but little, and for many years the growth of the fund was very slow. Recently, however, it has grown more rapidly. In 1896 the increase was a little over \$41,000; in 1897 it was \$38,523; in 1898, \$56,531; in 1899; \$45,319 and in 1900, \$48,036.

On October first 1901, this fund had reached the sum of \$1,096,118.37, and according to the report of the Auditor \$649,500 was invested in interest bearing securities at from four to eight per cent. Necessarily the remainder of this fund, \$446,618.37 must be reported as uninvested, and the impression has gone abroad that this balance is non-productive and lying idle in the State Treasury. This however, is not the case, for, according to a system which has been in operation for many years, the surplus in the Treasury is placed in State Depositories where it draws three per cent, and is compounded quarterly. So the entire fund is productive, and the interest, according to law, becomes a part of the general school fund, which is distributed each year.

A strange argument in favor of limiting the fund is that there is urgent need of a larger school income at once; that we should have a longer school term, and pay better salaries, rather than lay up in store for future generations that will be much better able to educate themselves than we are today. On the other hand nearly all the States of the Union have a much larger invested fund than ours, and they are adding to these funds in various ways from year to year. Some say, also, that if the principle of "laying up for a rainy day" is good for the individual, why not for the State, at least so far as it applies to a school fund?

At this point in the discussion it is proper to state that under the recent Act of the Legislature the growth of this fund will not be so rapid as it has been within the last six or eight years; in fact, the annual increase will probably be less than one third what it has been during this period. By the

provisions of the new corporation law revenues derived from the tax on the incomes of corporations go into the State fund and not into the School Fund as heretofore.



IT is not likely says Van Duke, that rich men, by virtue of their riches will ever become the ruling class in this country, in the open. The natural operation of jealousy and envy will take care of that. The possession of a large estate, in the eyes of those who do not consider how it was acquired nor how it issued, will always be a cause of suspicion often, as in the case of Washington, most ungenerous and unjust. But that rich men should endeavor to control legislation, local and National, in their own interest, and to secure influence and thus to become a ruling class in secret, is more than likely. It is natural. It is a fact.



A Pertinent Parable.

Hear a parable of the machine, the money bag, the mouth, and the hoe. The man with the machine persuaded the man with the hoe to vote precisely as he told him, and thus made himself of much value as a commodity of barter or an instrument of assessment. The man with the money-bag, desiring protection or power, went into the market place and found there the man with the machine, whereupon these two discovered a community of interest. This worked well until the man with the hoe grew suspicious that his part in the transaction, while the most important, was the least profitable. Then appeared the man with the mouth, promising to wind up the concern, distribute the assets, and alter the laws of nature so far as necessary to effect a universal exchange of hoes for money-bags. This programme was not fully carried out. But the machine was put temporarily out of repair; the money-bag was sent abroad for its health; the mouth had an opportunity to explain some of its promises and retract the rest; and the hoe having marched in several processions and gained much experience, went on hoeing as before.

The "Judicial Amendment."

To THE BAR:

At the last session of the Legislature the following amendment was proposed to the Constitution of the State, which is to be voted on for ratification or rejection at the next election:

"Section two of Article VIII to be amended so as to read as follows:

"Sec. 2 The supreme court of appeals shall consist of five judges. Those judges in office when this amendment takes effect shall continue in office until their terms shall expire, and the legislature shall provide for the election of an additional judge of said court at the next general election, whose term shall begin on the first day of January, one thousand nine hundred and five, and the governor shall, as for a vacancy, appoint a judge of said court to hold office until the first day of January, one thousand nine hundred and five. The judges of the supreme court of appeals and of the circuit courts shall receive such salaries as shall be fixed by law, for those now in or those hereafter to come into office."

Just who is responsible for the phraseology of this amendment is not generally known. It is apparently without parentage; and the legislature solemnly gives it a name by enacting that it shall be known as "Judicial Amendment."

What are the objects sought to be accomplished by this amendment?

1. To increase the number of the judges of the supreme court from four to five.

2. To enable the legislature to increase the salaries of the judges of both the supreme court and the circuit courts.

Will this proposed amendment, if adopted, achieve the ends for which it is designed?

The section which it proposes to amend now reads as follows:

2. The supreme court of appeals shall consist of four judges any three of whom shall be a quorum for the transaction of

business. They shall be elected by the voters of the State and hold their office for the term of twelve years, unless sooner removed in the manner prescribed by this constitution, except that the judges in office when this article takes effect shall remain therein until the expiration of their present term of office.

The amendment is a substitute for the whole of section two of Article VIII. Three essential provisions of the section as it now stands are omitted from the amendment.

1. That the *judges shall be elected by the voters of the State*. Is it intended that the Governor shall appoint them? Section 8, Article VII, says: "The governor shall nominate, and by and with the advice and consent of the senate * * * appoint all officers * * * whose appointment or election is not otherwise provided for." This amendment omits the provision requiring the election of judges by the people. Unless the legislature by law makes the requirement their appointment seems to vest in the Governor.

2. It further omits the provision that the *judges shall hold their offices for twelve years*. The power to prescribe the length of term must then be in the legislature. Was it the intention of the unknown draughtsman of this amendment to leave the length of term in abeyance subject to legislative regulation?

3. It further omits the provision, which is one of the safeguards to an independent judiciary, that the *judge shall hold his office during his term "unless sooner removed in the manner prescribed by this Constitution."* Is it the intention of this fatherless amendment to leave the judges of the supreme court to be legislated out of office at the whim or caprice of the legislature?

It can hardly be that the omission of the three clauses above named was accidental and due to an oversight. Why were they omitted? Is it the intention then, reading all the omissions together, that the governor shall appoint the judges? That they shall hold office for life, or during good

behavior, or merely at the pleasure of the Governor? And finally, that if unwilling to do the behests of the party that may happen to be in power they may be removed by a mere act of the legislature terminating their terms, without the process of impeachment? It is doubtless true that better judges could be secured through the appointment of the Governor, with the approval of the Senate, for a long term or a life term, than by election. But their tenure of office ought to be secure against interruption by mere act of the legislature.

Will the amendment proposed enable the legislature to increase the salaries of the judges of the circuit courts and of the supreme court? The "Judicial Amendment" does not pretend to repeal section 16 of Article VIII. It merely comes in conflict with it. Section two will stand as amended, if the "Judicial Amendment" is adopted, and section 16 will likewise stand. Both sections must be read and construed so as to give effect to both, if such reading and construction are possible. Section 16 in part reads as follows: "The salary of a judge of the supreme court of appeals shall be two thousand two hundred dollars per annum, and that of a judge of the circuit court shall be one thousand and eight hundred dollars per annum." The part of the amendment which we understand was intended to modify this provision is contained in the last sentence thereof, which is as follows: "The judges of the supreme court of appeals and of the circuit courts shall receive such salaries as may be fixed by law, for those now in or those hereafter to come into office." Now if both of these provisions are to stand, and are to be construed so as to give to both of them harmonious interpretation, what will be the result? It is not pretended that any part of section 16 is repealed. Are not the salaries of the judges now in office as well as those to come into into office fixed by law, and that law the law of the Constitution as expressed in section 16 of Article VIII? The amendment merely says that the judges shall receive such salaries as shall be fixed by law. Under this view and

interpretation there is no irreconcilable conflict between the two sections. They are in perfect harmony. Perhaps the use of the word "law" instead of "legislature" is unfortunate for the amendment. If the amendment had said that the salaries might be fixed by the *legislature*, the conflict between section 16 and section 2 as amended would be irreconcilable, and the repeal of so much of section 16 as is in conflict with it might be claimed.

R. E. FAST.

Morgantown, W. Va.



A Fulfilled prophecy About Lincoln.

In the Presidential campaign of 1856 the Democrats in the West made an effective point by contrasting Mr. Buchanan's long public career as a Senator, Secretary of State, and Minister to England with General Fremont's limited experience, consisting of a service of twenty-one days in the United States Senate.

In the great campaign of 1860 they tried the same tactics, which had proved so successful, to disparage Mr. Lincoln. He had served but a single term in Congress, while Senator Douglas had for many years enjoyed a national reputation.

This point was urged in a heated discussion, overheard, between an ardent supporter of Senator Douglas and a German voter who favored Mr. Lincoln. The former finally thought to overwhelm his opponent by saying:

"Who is this Lincoln, anyhow? Nobody ever heard of him until Senator Douglas brought him into notice by holding joint debates with him. Senator Douglas, on the other hand, is a great statesman. Why he has had his eye on the Presidential chair for the last ten years."

"Vot is dot you say?" was the reply. "You say Meester Douglas have had his eye on the Presidential chair for ten years?"

"Yes, that is just what I said."

"Vell, you shoost tell Meester Douglas eef he keep hees eye on dat chair shoost a leedle vile longer, he vill see old Abe Lincoln sitting down in it "

That closed the debate, amid a roar of laughter from the bystand e

Ethics of Brass—An Apology.

Mr. Editor of THE BAR:

Your January number publishes a Code of Ethics to be reported to the next meeting of the Bar Association; and a nice time will some attorneys have working in such lines.

Take No. 16 and 17 on page 38, about indirect advertisements, and newspaper articles—I wonder how you expect to get business or to reach courts and juries by underhand and cunning ways, if you cannot get free use of newspapers. Your idea is wrong. We are not in this business for amusement or reputation, and the lawyers have as much right to advertise and “get there” as other people.

The men who make fortunes in other trades or pursuits dependent on patronage of the public, thrive mainly by just the things this pretty code condemns. Take “Peruna”, and hair restorers and ointments for itch and itching, and soaps, and the loathsome mixtures for worse complaints—they get into all corners of the papers, and big pay is given for the chance of winning customers. Don’t you know that what sells the truck is the ink, and the men who get it up could not reap a harvest of wealth if there was no money in it? “Take Kidney-olds.” You read aloud to a lady some pretty story, that looks all right, and is really interesting, when all of a sudden you run onto something that you cannot mention hardly to anybody, leastwise to a woman; and then you see that some smart fellow has been hired to write a sly puff for the drug, and it gets into your mind in spite of your disgust. It is more than likely, too, that when you throw the paper down she will pick it up to see what was the matter. That makes two people who find what they never thought of before, and if they are simple as most folks are, they may send for this thing, if they get the symptoms.

Now the reader may not like the nastiness of this, but he will likely remember the name and what it is said to be good for, and even if he pities the compounder of filth, the latter don’t care if he is called on and paid when the trouble comes; and so, the advertiser makes his point and money,—that’s the thing.

Decent doctors don't stoop to that way of pushing themselves, and many of them stay poor and respected, who could be rich, if they could once get on to telling the ailments and cures of the people that consult them. Many a quack doctor, who advertises big makes more money than a real gentleman in the medical profession, who is not cute enough to toot himself. Just think how easy and cheaply a physician who has the confidence of a community, could keep his name before the public. He knows lots of things that neighbors would delight to understand, of things past, present and to come; and just a little account from time to time of who has pains and where, and short articles on deformities and mishaps, with exaggerated estimates of his own abilities and a skillful puff of the doctor, would give the public piles of gossip, and bring him into widening fame.

You think an honorable man would not do this for practice and money and that he would hurt the feelings of the people whose confidence he betrays; but there is where he misses his chance, and it is a better chance than the Itch man, who has to pay for the use of columns which a lazy reporter may be glad to fill free for a home professional man.

It is heap more so when we come to lawyers. They have the most interesting business of every community. The papers want to treat them well, to get the legal advertisements etc., and they do so much writing that they are handy in presenting a subject. They can fix a fairy tale to beat Simmon's Regulator a romance in real life—drawing names of modest women or distressed parents, and the category of human weakness and woe into a long-spun advertisement of the lawyer.

Mrs. Flaherty has a vicious cow, and a neighbor a deficient pig style, and a blind boy has a damage suit any of these themes can be worked up, and the slick lawyer can be made the hero of a drama, and a miracle of learning, by an adroit insertion of his name almost anywhere. His name is not signed, because that would give the thing away; but, Mr. Editor, we should glory in such a man, because he fools people, sponges on the press, uses his opportunities, gets a boost, and in the way of notoriety he excels men of self-respect.

Your code also makes a hit at articles written to influence proceedings in court, but you must not cut us off from this insidious

means of advantage. You want to get solid with the judge, or make people think you are. A good stiff fulsome eulogy on a judge warms his heart and sinks into his memory; and if he is too vain to be nauseated, he is more apt to favor the man who flatters him in public print, than one who squirts such secretions into his naked ear. I calculate that a judge holds his job by his popularity and you must work on that. You cannot tell him from the bar, or in a brief, what others will think of a decision, and he will smell something if you put it at him privately, but if he reads the same thing in a paper as coming from some other source, you may catch him, unbeknownst.

The same idea applies to the jury—only you must be more careful so as not to get jailed for contempt, and in all cases you must use artful language, according to the matter in hand.

If you can make the public think that you are doing a big business, and have a stand in with the court, and if you can then get a pull on the court and jury through the press, you have a long lead ahead of the "old-timers" who have too much character to adopt the schemes of shysters—and above all, it costs you nothing in money—the publishers pay all that.

Don't you think, that when the newspapers afford us this free road to vulgarity and profit, you should oppose any rules that would block the course?

There is no money in writing for the BAR. It is read by very few who admire fakirs, and it offers no show to push my business, so just please don't try to interfere without enterprise; and I take leave of you, with the request that you do not publish my full name, because this is an instance where it would not pay to sign it.

"ELL."



"Mummy," said a small girl—mummy, dear, I do wish I might give some money for poor children's dinners."

"So you may, darling."

"But, mummy, I haven't any money."

"Well, darling, if you like to go without sugar I will give you the money instead, and then you will have some."

"Must it be sugar, mummy?"

"Why no darling. What would you like to do without?"

"How would soap do, mummy?" exclaimed the small maiden in triumph.—Ex.

Can a will be Typewritten.

TO THE BAR,

Under our Code, Chapter 77 section 3 "no will shall be valid unless it be in writing and signed . . . and moreover unless it be wholly written by the testator the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses.

As a general principle writing includes printing. Page on Wills, sec. 159. *Henshaw v. Foster*, 9 Pick. 312.

All contracts which are required to be in writing under the statute of frauds, and all deeds which are required to be in writing, are no doubt good when typewritten. Before the time of the typewriter, policies of insurance, bills of lading, bonds, notes, checks and drafts, deeds, and other instruments were often on printed forms, and never seemed to have been rejected or questioned by the courts as proper compliance with "writing" where required, and as constituting written instruments. The late authorities say that the only branch of business or of communication at this day which does not recognize typewriting, is the diplomatic service and the correspondence and treaties between nations. But under our statute it is perfectly plain that the statute contemplated manuscript, because it provides that unless the will "is written by the testator" it shall require witnesses, etc. That does not mean that a paper could be written in the form of a will by a typewriter and the name of an individual signed to it in type, and then that the paper could be probated as a will by proving that the proposed testator was seen to have pecked it off on a machine. Our statute contemplated that the will should be so written that the character of the writing would indicate its authorship, and show whether or not it was in the handwriting of the person who signed it. The handwriting being just as much a thing to be considered as the signature affixed.

It is the opinion of the writer that a typewritten will is valid under the laws of West Virginia when properly executed and witnessed, and that while a holograph will can only be in the

handwriting of a testator yet type writing will satisfy the statute as to any will which has been duly witnessed; Can any one cite a West Virginia case on the question?

"X. Y. Z."



Mr. Evarts' most conspicuous, perhaps sole, title to fame is, that he was a great lawyer and brilliant advocate. As such, he shone in the impeachment case against President Johnson and in the proceedings before the Geneva Tribunal. And as a lawyer, he urged before the Electoral Commission, that Mr. Hayes had a better title to the Presidency than Mr. Tilden. From his youth up his training had qualified him for forensic efforts, his study of legal principles was profound, his acquaintance with literature was wide, his ideas of professional ethics were exalted. He held great National offices, but his title to them was rather as lawyer than statesman.

Although of only medium height and of spare frame, he nevertheless presented a striking figure. His carriage was erect, his head well poised and conscious power was written in his face. His was a head worthy of the sculptor's art, with the lofty brow, the brilliant eyes, the long intellectual nose, the short but firm chin. A full length portrait in oil of Mr. Evarts may be seen at the New York City Bar Association, and it shows his impressive features to advantage. Painted or sculptured, the head is distinctively an intellectual head, and the dominion of mind was written so plainly all over his features as to impress even the most casual observer.—Ex.



One day the Sligo people say a man from Roughley O'Byrne was tried in Sligo for breaking a skull in a row, and made the defense, not unknown in Ireland, that some heads are so thin you cannot be responsible for them. Having turned with a look of contempt towards the prosecutor he cried: "That little fellow's skull, if ye were to hit it, would crush like an egg-shell," he beamed on the judge and said: "But a man might whallop away at your head for a fortnight."—From *The Celtic Twilight*, by W. B. Yeats.

Testified to what he Said to Himself.

Representative Wellep, a Kansas legislator, is probably the only man in the world who has been allowed by a court of inquiry to testify regarding what he said to himself.

In 1895 a committee was appointed by the Kansas legislature to investigate the alleged bribery of certain members in connection with a defeated railroad bill. Mr. Wellep was the first witness called by the prosecution. In the course of his testimony he told of seeing Representative M—— late one night coming down a hotel stairs. "I said to myself," continued Wellep, but a member of the defense had jumped to his feet.

"Hold on!" he shouted, "you can't testify about what you said to yourself!"

The prosecutor retorted hotly that there was no law to prohibit Mr. Wellep from so testifying.

Both serious and ludicrous was the argument that ensued. A majority of the committee finally concurred in the chairman's decision, that the witness had a right to tell what he said to himself.

"I said to myself," seriously proceeded Wellep, "that M—— had been up to Billy Carter's room to get his pay."

The testimony was recorded and made a part of the official record of the Kansas house.



Soon after Daniel Webster came to the bar, he was retained in a suit between two neighbors. It seemed that they had got to loggerheads about a disputed line, out of which had grown trespass suits and all sorts of controversies, and that the more malicious and artful of the two had so plied the other with law in one shape or another, that he had nearly ruined him. The latter at last became aroused, and brought an action against the other for malicious prosecution and retained Mr. Webster to manage it. On the trial proof of malice was clear and convincing, and it was evident that the day of reckoning had at last come. In summing up for the plaintiff, Mr. Webster after making a strong argument against the defendant, showing that he had again and again instituted suits against his client, merely to perplex and annoy him, closed as follows: "In a word, gentlemen, I do not see how I can better conclude than in the words of the good old psalm." Then looking at the jury but pointing to the defendant, he repeated from his favorite authors, Sternhold and Hopkins:

He digged a pit, he digged it deep,
He digged it for his brother,
By his great sin, he did fall in
The pit he digged for t'other.

And so it proved. The verdict was heavy against the "digger."

Looking Backward.

One hundred years ago a man could not take a ride on a steamboat.

He could not go from Washington to New York in a few hours.

He had never seen an electric light or dreamed of an electric car

He could not send a telegram.

He could not talk through the telephone, and he had never heard of the "hello" girl.

He could not ride a bicycle.

He could not call in a stenographer and dictate a letter.

He had never received a typewritten communication.

He had never heard of the germ theory or worried over bacilli and bacteria.

He never looked pleasant before a photographer or had his picture taken.

He had never heard a phonograph talk or saw a kinetoscope turn out a prize fight.

He never saw through a Webster's Unabridged Dictionary with the aid of a Roentgen ray.

He had never taken a ride in an elevator.

He had never imagined such a thing as a typesetting machine or a typewriter.

He had never used anything but a wooden plow.

He had never seen his wife using a sewing machine.

He had never struck a match on his pants or anything else.

He couldn't take an anæsthetic and have his leg cut off without feeling it.

He had never purchased a ten cent magazine which would have been regarded as a miracle of art.

He could not buy a paper for a cent and learn everything that had happened the day before all over the world.

He had never seen a McCormack reaper or a self-binding harvester.

He had never crossed an iron bridge.

In short there were several things that he could not do and several things he did not know.

The Meeting.

THE outlook for a profitable and entertaining meeting of the State Bar Association, at Clarksburg, is exceedingly flattering.

The Secretary reports that the indications for a large attendance are good; the program is one of the best; the papers will interest every lawyer; the two addresses will be delivered by two eminent members of the Profession, the one a leading lawyer in this State, and the other the leader of the bar in Pittsburgh. It goes without saying that as guests of the Clarksburg bar the social features will be unsurpassed in the history of the Association. These annual meetings are becoming more attractive every year, and it will only be the natural course of things that make the coming meeting the best of all. The following is the program in detail:

**SEVENTEENTH ANNUAL MEETING
OF THE
WEST VIRGINIA BAR ASSOCIATION
AT CLARKSBURG,
February 12th and 13th, 1902.
PROGRAM.**

FIRST DAY—FEBRUARY 12.

2:00 P. M.—Annual Address of President - - - John Bassell.
Report of Committee on Admissions and Election of Members.
Report of Secretary.
Report of Treasurer.
Report of Standing Committees as follows:
Executive Council.
On Judicial Administration and Legal Reform.
On Legal Education.
On Grievances.
On Legal Biography.

PROGRAM CONTINUED.

3:30 P. M.—Paper, by Hon John A. Campbell, of New Cumberland,
Subject—"The Proper Method of Nominating Candidates for
Judicial Offices, and the Salaries to be paid Judges."

8:00 P. M.—Annual Address by Hon David T. Watson, Pittsburg, Pa.
Subject to be Announced Later.

SECOND DAY—FEBRUARY 13.

9:00 A. M.—Paper - - - Edgar B. Stewart, of Morgantown,
Subject—"The Torrens System."

Paper, - - - - - Z. T. Vinson, Huntington,
Subject—"The Decisions of the Supreme Court Relating to
Our Newly Acquired Territories."

2:00 P. M.—Nomination of Officers.

Appointment of Standing Committees.

Miscellaneous Business.

Election of Officers.

Election of Delegates to American Association.

8:00 P. M.—Banquet.

TOPICS FOR DISCUSSION

1. The Constitutional Amendments Proposed by the Legislature of 1901, and the Duty of the Association, Collectively and Individually in Relation Thereto.
2. The Report of the Special Committee on a Code of Ethics.
3. The Admission of Attorneys from Other States to Practice in this State upon their Foreign License Alone.
4. The Recent Statutory Changes in the Action of Assumpsit—their Wisdom and Expediency.
5. The Advisability or expediency of Adopting a Minimum Schedule of Fees.
6. A Majority Verdict in Civil Cases.
7. The Taking of Chancery Evidence in Open Court.
8. The Formation of Local Bar Associations in Connection with the State Association.

(Any of the above topics may be called up at any time when the Association is not otherwise occupied by the regular program.)

Blind Conservatism in Administering Criminal Law.

UNDER this heading the New York Law Journal criticises the West Virginia Court of Appeals in rather drastic style, for its ruling in a recent case.

The Journal says:

The decision of the Supreme Court of West Virginia in *State v. Sheppard* (89 S. E., 676) illustrates the blind conservatism with which the criminal law is still administered in some jurisdictions. On the trial of the defendant for a felony, before his entrance into court a witness has been asked her name and that of her husband. The prisoner's absence was then noticed and he was brought into court and the same answers were given. The appellate court had the hardihood to hold that the taking of such testimony in the prisoner's absence amounted to reversible error. This is the most barrenly technical, the most absurd decision that has come to our notice for a long period.

The Journal is generally conservative in tone and judicial in the use of language, but the above criticism strikes us as a radical departure from its usual calm and considerate spirit.

It may be that the case presents an extremely technical adherence to the requirement that the defendant in a criminal trial has a right to be confronted with the witnesses against him. The omission in this instance was, it must be admitted, merely formal and inconsequential, and was attempted to be cured by repeating the questions and answers that were made in the defendant's absence. But, nevertheless, the rights of the defendant had been violated by beginning the examination while he was absent. If the court had liberty to curtail his privilege in *any degree or to any extent* who is to determine the scope and extent of the court's discretion in this regard? The law does not give the court any discretion. It is not a matter that is submitted to the discretion of the court at all. The law is positive and inelastic.

If it is violated in any degree the rights and protection of the defendant have been violated in that degree. The law has been broken and the question of degree is not in it.

The danger in such cases is in first opening the gate. The court of Appeals in this case doubtless, did not regard the technical curtailment of the defendant's rights as prejudicial to his case, but the decision was based upon the necessity of adhering to the positive law, and the danger of a disastrous precedent in the court assuming to ignore or assume the prerogative of making such a law elastic to any degree within its discretion.

Our conservative contemporary would have been more like itself if it had said: There is more wisdom in a criminal court being unreasonably technical in the enforcement of a positive law than in assuming a prerogative to say how far it shall or shall not be enforced.



WE are in receipt of prompt reports for the current year from the following accommodating Circuit Clerks:

J. V. Bell, of Keyser;
W. H. Wilson, of Elkins;
Jos. A. Anderson, of Summersville;
J. H. Patterson, of Marlinton;
D. H. Hendrickson, of Petersburg;
Jas. H. Martin, of Winfield;
J. G. Mayfield, of Middlebourne;
C. K. Chapman, of Harrisville;
W. K. Pritt, of Parsons;
E. C. Tetrick, of Clarksburg;
R. A. Flesher, of St. Mary's.

Also from J. F. Engle, G. W. McCauley, C. N. McWhorter, and Earl Barr.

If Circuit Clerks will kindly close up the year's business this month, we will promise not to bother them for a year at least.

Dog Lure in North Carolina.

The North Carolina Supreme Court has decided its first dog case, and the dog lost, says the North Carolina Law Journal.

The question it was asked to pass on was whether a man can be convicted of theft on the uncorroborated testimony of a dog.

The court, through Justice Cook, gives a negative answer.

A store was robbed in Pitt county early last February. The thieves entered through a window and left a basket. Next day, after the robbery had been discovered, bloodhounds were secured from Kinston, allowed to smell the basket and the window and then started upon the trail. Finally they went up to Amos Moore and bayed him, and then to Ashley Dixon and bayed him. Thereupon they, with four other negroes, were arrested. Later one of the four turned State's evidence and implicated all the others.

On the trial the action of the dogs in regard to Moore and Dixon was testified to by a witness against the earnest protest of the defendant's counsel, who contended that the evidence was incompetent, as the tracks the dogs trailed had never been identified as the defendants' or proved that they were made by them at the time of the larceny.

The Supreme Court sustains his objection and orders a new trial for Moore and Dixon.

The court holds that the trailing of the men's tracks and the baying of them by bloodhounds, unless the tracks are otherwise identified or the men connected by other evidence with the theft, are insufficient to convict. The opinion goes on to say that in this case there is no evidence to connect the circumstance of the baying of the men with the making of tracks at the time the larceny was committed, nor is there any evidence that the dog scented any tracks made by the defendants.

The opinion, is written by Judge Cook, who in the course of it, discourses quite learnedly on dogs. He says:

"It is a matter of common knowledge that there are many breeds of dogs endowed with special traits and gifts peculiar to their

respective kind—the pointer and setter take instinctively to hunting birds; the hound to foxes, deer and rabbits, but we know of no breed which instinctively hunts mankind. Yet we know that dogs are capable of running the tracks of human beings, as is frequently evidenced by the lost dog trailing his master's track long distances and through crowded streets, and finally overtaking him, which demonstrates the further fact that the dog's distinctive peculiarity exists between different persons which can be recognized and known by a dog. And it is a well known fact that the bloodhounds can be trained to run the track of strangers; and in this the training consists only in being taught to pursue the human track; the gifts or powers or instincts being already inherent in the animal he is induced to exercise them under the persuasive influence and protection of his trainer or master. Once trained in this pursuit, we must assume that his accuracy depends, not upon his training, but upon the degree of capacity bestowed upon him by Nature. Experience and common observation show that among dogs of the full blood and full brothers or sisters, one or more may be highly proficient, while others will be inefficient, unreliable and sometimes worthless; some may be acute to scent, while others will be dull to scent and incapable of running a 'cold' track. Then, again we may find the most reliable and favorite hound taking the 'fresher' track which crosses his trail, or quitting the cold trail of a fox and following the 'hot' trail of a deer which he might strike. Likewise the pointer or setter may abandon a 'cold' trail of a covey of birds and follow a 'warmer' one upon which he may happen to run. Or the squirrel dog may leave the tree at which he has taken his stand and barked, and go to another, or quit entirely. So it does no violence to common experience to assume that dogs are liable to be deficient in their instincts. Therefore, we frequently hear hunters speak of some dogs as 'true' and 'staunch,' while others will be denounced as unreliable or 'liars.' It sometimes happens that the best trained fox hounds will lead their masters into a rabbit chase, or a pointer will hold his master with trembling excitement while he 'points' a terrapin."



It was a Harvard law student who, having found a flea in bed, described it as a chose in action.

A Bit of Humor Based in Fact.

Up in the mountains of North Georgia there was recently on trial before a rural justice of the peace a suit for damages against the Southern Railroad. The action was for injuries sustained by a farmer of that section, on account of his fence having been burned by sparks from one of the engines operated by the defendant company. The case was hotly contested, but the farmer won out through the adroitness of his counsel. In the course of his argument, counsel for the defendant read at length from Shearman on Negligence, and seemed to have the better of the argument until counsel for the plaintiff in his reply said: "Your Honor, it would appear to me to be a contempt of court for a lawyer to get up here, in the good State of Georgia, and in one of her courts, and quote Sherman as authority in the defense of one who has set another's property on fire. Your Honor is too well acquainted with Sherman and his fires to tolerate this sort of a thing for a moment, I am sure." The remark had the desired effect. The old justice, raising himself to an upright position, purple with rage, exclaimed: "You are right, sir! you are right! Take a judgment for the full amount of your claim, together with interest, attorney's fees and costs. And you, sir," turning to the amazed counsel for the defendant, "if you ever dare to read to this court from that book again, I will, sir, send you to jail, sir."

It is needless to say no explanation was attempted.



The lawyers are a power in every State. Suppose they should all go to work and make lynching unpopular? They cannot only do this, but they can do much to reform our present system so that justice will be more swift and certain.



In *State vs. Hawley*, 63 Ct., the court determines the old question of the guilt of our first parents; saying, "Adam and Eve were both guilty."

WEST VIRGINIA COURT OF APPEALS.

Decisions Handed Down at the Last
Term.

REPORTED SPECIALLY FOR THE READERS OF THE BAR.

Appearing Here For the First Time in
Print.

Gall vs. Bank
Brannon, P.

(From Barbour County.)

Decree reversed and bill dismissed.

Dent dissented and filed an opinion.

Syllabus

1. Where an action is pending on the law side of the circuit court upon a common law bond equity will not take jurisdiction to enjoin the prosecution of such action and decree cancellation of the bond on the mere ground that a compromise of the liability under the bond had been made, and that the sum of money stipulated by the compromise to be paid in discharge of such liability had been paid, as adequate defense against the bond on such grounds can be made in the action at law.

2. Cancellation. Principles on which equity will exercise jurisdiction to cancel written instruments.

Bennett vs. Pierce,
Brannon, P.

(From Barbour County)

Decree affirmed

Syllabus.

1. In a suit in equity to enforce specific performance of an executory contract, if the title of the vendor is questioned on

reasonable ground, the vendor must show good title; but in a suit to enforce a lien reserved in a deed conveying the land for purchase money, the purchaser must clearly show actual defect of title, or a suit pending or threatened involving it, and the ground on which the cloud rests.

2. A deed though void is good color of title under the statute of limitations.

8. If one co-parcener or tenant in common conveys the entire tract to a stranger, and the stranger takes actual possession claiming the whole, it is an ouster of the other co-parceners or tenants in common, and the stranger's possession is adversary to them, and the statute of limitations runs in his favor.

4. When the period of the statute of limitations as to recovery of land has run out, the statute vests good title in the occupant against his adversary.

5. Though at the date of a conveyance of land retaining a lien for purchase money the title of the grantor is defective, yet if at the time when he asks a decree to enforce that lien in a suit brought for the purpose, the title has become good and valid, the original defect of title will not debar the grantor from such relief.

Ward vs. Ward's Heirs.

Brannon, P.

(From Taylor County)

Decree reversed. Remanded.

Dent absent.

Syllabus.

1. A general objection to an answer is good if it contain no matter whatever presenting a bar to any of the relief contemplated by the bill; but if it contain some matter good as such bar, and other matter not good, a general objection will not answer, but there should be exceptions pointing out the special objections.

2. If an appellant, pending his appeal, convey all his right involved in the appeal to his adversary in the appeal, or in any way release error, the fact may be pleaded in bar of his appeal; but failure to so plead will not conclude the right of such adversary under his conveyance.

3. A conveyance from one co-parcener to another co-parcener of his undivided interest in the common land, does not pass his pre-existing demand against his co-parceners or their interests in the land for improvements put upon the land, unless such demand is expressly released or transferred in the conveyance.

4. If a supplemental answer is filed presenting new matter of defense, the plaintiff has right seasonably to file an amended bill to meet such new matter.

5. A special replication is not available in chancery practice, but an amended bill must be used. Under Sec. 35, Ch. 125, Code, a special reply may be made to an answer of new matter calling for affirmative relief and answering the purpose of a cross bill; but a special replication is a different thing.

Gall vs Gall
Brannon, P.
(From Barbour County.)
Decree reversed. Demanded.

Syllabus

1. Where a petition is filed in a suit in equity by one not a party to it, and whose rights are not mentioned in the bill, and such petition asks relief touching the subject matter of the bill, and such petition disclosed an interest in the petitioner in such matter hostile to the claim of the plaintiff, the plaintiff must file an amended bill to bring the petitioner and his claim before the court before there can be an adjudication of the plaintiff's rights. The mere petition does not make the petitioner a party for the purposes of decree.

2. Where necessary parties, as disclosed by the record, are not before the court, a decree affecting their rights will be reversed and the cause remanded for an amended bill bringing them and their rights in, without passing on the merits.

3. One not a party to a bill can make no defense to it by demurrer or answer.

4. Where a bill seeks subrogation to a lien on land, and there are other persons holding liens on the land in conflict with such claim of subrogation, they must be made parties to the bill.

Camden vs Ferrell
Brannon, P.
(From Webster County)
Decree affirmed

Syllabus

A bill of review based on newly discovered evidence does not lie to a decree by default.

Poling
vs.
Board of Education.
Poffenbarger, J.
(From Barbour County)
Reversed and Remanded.

Syllabus.

1. Mandamus does not lie to enforce against a board of education the payment of a claim for supplies, furnished for use in school houses, which has not been reduced to judgment against such board or merged in an order issued therefor.

2. Mandamus does lie to enforce the payment of an order issued by such board and for the satisfaction of a judgment recovered against it.

3. When a board of education refuses to allow or disallow a claim for such supplies and refuses to consider it at all, mandamus lies to compel it to act upon the claim, but not to control it in so doing, or to compel an allowance of the claim or the issuance of an order therefor.

Carlens, vs Carlens
 Brannon, P.
 (From Wood County)
 Decree reversed, in part.
 Syllabus

1. A decree of divorce a mensa et thoro allowing alimony to the wife is res judicata as to the alimony; but the husband may be discharged therefrom by the subsequent adultery of the wife.

2. A decree fixing the custody of a child upon decree in a divorce suit is final on the conditions then existing, and should not be changed afterwards unless on altered conditions since the decree, or no material facts then existing, but then unknown, and for the welfare of the child.

Iron Company vs Quesenberry
 Brannon, P.
 (From Summers County)
 Decree affirmed
 Syllabus

1. A bill in equity to set aside a judgment and obtain a new trial must allege facts showing a valid legal defense to the original cause of action, in addition to the mistake or other ground of relief, and the defense stated must be of such a nature that it would be likely to change the result upon a new trial. The mere general statement that a party has a valid defense will not do,

2. In a pleading a statement of what is only a conclusion of law, without facts given, or what is only the opinion of the party on facts not given, is bad.

Samuel Newberger and Dora Newberger
 vs.
 Charles E. Wells and D. H. Leonard.
 Poffenbarger, J.
 (From Wood County)
 Revised and remanded.
 Syllabus.

1. When the basis of an action or suit is some fraud committed by the defendant, and the plaintiff does not, and can not by exercising due diligence, discover it immediately, the original fraud is regarded not only as causing the wrong complained of and for which the action or suit is brought, but as performing the further function of concealing the wrong and obstructing the prosecution of the cause of showing by the plaintiff that, though exercising due diligence, he did not and could not discover the original fraud, and, in such case, the statute does not begin to run until the time when the wrong was, or ought to have been discovered.

2. In matters of concurrent jurisdiction, equity, by analogy, applies to stale claims, the bar of the statute of limitation, and recognizes the same exceptions to its operations that are allowed in courts of law.

J. J. Sperry, Petitioner,
vs.
J. M. Sanders, Judge, and John Valden.
Poffenbarger, J.
Writ refused and rule discharged.
Syllabus.

In a chancery suit brought to enforce the lien of a judgment upon real estate, a circuit court has jurisdiction to determine whether or not such judgment is valid, although it may be void upon its face, and the writ of prohibition does not lie to restrain the judge of such court from proceeding in such cause.

Milton A. Ammons, Guardian, &c., et als.,
vs.
Howard L. Ammons, et al.,
South Penn Oil Company, Appellant,
Poffenbarger, J.
(Monongalia County)
Reversed and remanded.
Syllabus.

1. A purchaser of real estate devised to infants in remainder, and sold under decree in a summary proceeding, brought under chapter 83 of the Code, who, before paying all the purchase money, discovers that the decree of sale and proceedings are, in material respect, not in conformity with the statute, and therefore, so erroneous as to becloud and endanger his title, may file his petition in said proceeding for the purpose of having such error corrected and his title cleared, and have relief thereon as far as it is in the power of the court to give it.

2. When, in such case, the infant remainder-men, by their guardian, bring a suit in chancery to compel the purchaser to pay the balance of purchase money due, exhibiting with the bill all the decrees and orders made and papers filed in the summary proceeding, and the purchaser answers the bill, averring as new matter constituting a claim for affirmative relief, the error and irregularity in the decrees, and prays a correction of the same, and confirmation of the sale, and also files a cross-bill for the same purpose, the original bill should be treated and regarded as a rule, in the summary proceeding, to show cause why the purchaser should not be proceeded against for the failure to pay the purchase money, and the answer and the cross-bill of the purchaser as his petition in the summary proceeding for correction of the error and perfecting of his title.

3. When the real estate so sold is an estate in remainder, created by a devise to the daughter of the testator for her natural life, remainder in fee to her heirs, and the sale is made upon the application of the guardian of her children, her children, born after such sale, are deemed to have been before the court by representation, and can claim no interest except in the fund arising from the sale, and in it they are entitled to share equally with the others.

4. Quaere, whether said principle of representation is qualified to

the extent that a decree of sale, which fails to provide for, and protect, the interest of the persons not *in esse* and so deemed to be before the court, by substituting the fund derived from the sale of the land in place of it, and preserving the fund to the extent necessary to satisfy such interests, is ineffectual to pass their title to the purchaser.

Howard Clark, Plaintiff, Below,
Defendant in Error,

vs.

The West Virginia Central & Pittsburg Railway Company,
Defendants Below, Plaintiff in Error.

(From the Circuit Court of Tucker County)

Poffenbarger, J.

Reversed and remanded.

Syllabus.

1. A writ of error lies from the Supreme Court of Appeals to the order of a judge of a Circuit Court improperly refusing an appeal from the judgment of a justice of the peace.

2. Such order made in a case tried by a jury in a justice's court, in obedience to the decisions of the Supreme Court of Appeals, holding an act of the legislature, allowing appeals in such cases, to be unconstitutional, in a case involving the constitutionality of a law, and such writ lies, although the amount in controversy is less than one hundred dollars.

Blue Jacket Consolidated Copper Co., Plaintiff below, Appellant.

vs.

Arnold C. Scherr, Auditor of the State of West Virginia, Defendant below, Appellee.

Affirmed.

Poffenbarger, J.

Syllabus.

1. The collection of an illegal tax cannot be enjoined upon the sole ground that it is illegal.

2. A bill for an injunction to stay the collection of taxes must tender or offer to pay such taxes as are conceded to be due, or as the court can see ought to be paid, as a condition precedent to the granting of such relief.

3. State officers, who, under the color of the authority of unconstitutional state legislation, are guilty of personal trespasses and wrongs, may be sued, although the constitution of this state provides that the State shall never be made defendant in any suit at law or in equity; and suits may be maintained against such officers in their official capacity, to arrest or direct their official action, by injunction or mandamus, when said suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest; but in other cases such suit cannot be

maintained when such officer is only a nominal party, for such suit is then tantamount to a suit against the state.

4. Sections 86 and 87 of chapter 35 of the Acts of the legislature of 1901, classifying corporations chartered under the laws of this state, and designating those having principal places of business or chief works outside of the state as non-resident corporations, and imposing upon them a greater license tax than upon those having their principal places of business and chief works within the state, does not, in so classifying them and discriminating, violate Section 1 of Article 10 of the Constitution of this state, nor Clause 1 of section 10 of Article 1 of the Constitution of the United States, nor the 14th Amendment to the Constitution of the United States, and is, therefore, valid and the charge of such greater tax upon such non-resident corporation legal.

Henry, Schmulbach, Frederick J. Park, and Chas. M. Frisell, plaintiffs below, plaintiffs in error,

vs

Joseph Speidel, Charles Menkemeller, Charles W. Kreiter, and John Kreiter, and John S. Ritz, defendants, below, Defendants in error.

Poffenbarger, J.
From Ohio County.
Affirmed.
Syllabus.

1. Mandamus lies to correct an improper amotion from office and to restore to the full enjoyment of his franchise a person who has been improperly deprived thereof: and when one has been wrongfully deprived of his office by the illegal appointment of another, the writ lies to compel his restoration, though the person appointed in his stead be in possession *de facto*.

2. When a city council is composed of two bodies, called branches, a majority of each of which is necessary to a quorum, which by law are required to meet in joint session at the first meeting after the regular charter election, or as soon thereafter as practicable, and elect certain city officers, and at such regular meeting fewer members than a quorum appear in each branch, and the charter empowers a smaller number than a quorum to adjourn from time to time and compel the attendance of absent members, and in pursuance thereof the council had theretofore provided by ordinance that such smaller number may order the city sergeant, or any of his deputies, to arrest the absent members, or any of them, and cause them to appear forthwith to the place of meeting, and there to remain until the meeting adjourn or leave of absence is given, and had also previously provided by ordinance that the first branch, upon notice by messenger from the second branch, shall proceed in a body to the chamber of the second branch and proceed to elect officers, a quorum of each being present; and such smaller number than a

quorum so meeting do cause the absent members to be so arrested and compelled forthwith to attend, and before any adjournment in either branch is had, the second branch, by messenger, gives such notice and thereupon the presiding officer of the first branch and a minority of its members proceed willingly, and the others under compulsion, into the chamber of the second branch and the election of officers is there proceeded with, and a majority of such first branch refuse to vote in such election, but a majority of all the members in such joint session do vote for the persons elected, such election is valid.

Marr

vs.

Town of Mannington.

McWhorter, J.

(From Marion County)

Affirmed.

Syllabus.

Same as Dancer vs. Town of Mannington decided at this term.

State of West Virginia,

vs.

Miles Davis and Others.

Dent, J.

(Pleasants County)

Reversed and Rule discharged.

Syllabus.

1. On trial of persons charged with contempt in disobeying an injunction, the evidence must be sufficient to establish guilt beyond a reasonable doubt; otherwise the rule should be discharged.

State

vs.

Young.

(McDowell County)

Dent, J.

Affirmed.

Syllabus.

1. If a person maliciously and without provocation fire a gun charged with a deadly load into a crowd regardless of consequences and kill an innocent bystander, he is guilty of murder, and it is for the jury to say from the facts and circumstances whether such killing was wilful, deliberate and premeditated.

2. A suspension order entered on motion of the prisoner after trial; verdict, judgment and sentence will not vitiate such trial, verdict, judgment or sentence, although such suspension order fail to show the presence of the prisoner in person at the time it was entered.

Schilb vs Moon
Brannon, P.
(From Wood County)
Decree reversed, remanded.
Syllabus

1. The judgment creditor in a judgment upon a negotiable note must be a party to a suit in equity by a subsequent endorser to enforce substitution to the lien of the judgment against the land of the prior endorser.

2 A subsequent endorser of a negotiable note who pays a judgment on it in favor of the holder against the maker, a prior endorser and the subsequent endorser, the maker being insolvent, is entitled in equity to substitution to the lien of the judgment against such prior endorser.

3 A subsequent endorser of a negotiable note paying a judgment on it against the maker, a prior endorser and himself, which is a lien on land of the prior endorser, may sue in equity to enforce substitution to the lien of the judgment against the land of the prior endorser, without first getting a judgment at law against the prior endorser, for the money paid by him.

Fletcher
vs.
Hickman
Brannon, P.
(From Ritchie County)
Judgment reversed. Habeas Corpus dismissed.
Syllabus.

1 When a father has committed the custody of his infant child to another person by agreement to be maintained and cared for, which agreement has been acted on by such other person. such agreement will bind the parent, and prevent his reclaiming custody of the child, unless he can show that a change of custody will plainly promote the child's welfare, moral or physical.

McConnell
vs
Cox
McWhorter, J.
(Marshall County)
Reversed and remanded.
Syllabus.

1 While a building association may fix a minimum premium payable in advance or in periodical installments, such premium must be a lump sum, certain and definite, and not a percentage payable indefinitely at fixed periods.

2 A percentage payable indefinitely at fixed periods is interest, and although it be called "premium," and is in addition to the legal rate of interest already charged, it is usurious, and should be expunged from the account. Gray vs Baltimore Building and Loan Association, 48 W. Va., 37 S. E. 53.

Floyd

vs.

Town of Mannington.

McWhorter, J.

(From Marion County)

Affirmed.

Syllabus.

Same as *Dancer vs. Town of Mannington* decided at this term.

Stewart L. McClain, Plaintiff below, Appellee,

vs

Thomas Batton, Defendant below, Appellant.

Poffenbarger, J.

From Doddridge County.

Reversed and Remanded with leave to amend the bill.

Syllabus.

1. Where a sheriff appends to his list of sales of delinquent lands the following affidavit: "I, S. B. Mc., sheriff of the county of D., swear that the above list contains a true account of all the real estate within my county which has been sold by me to individuals, during the present year, for the non-payment of the taxes thereon for the years, 1889 and 1890, and that I am not now directly or indirectly interested in the purchase of any said real estate," thus omitting from the affidavit required by law the words "Nor have I at any time been directly or indirectly interested in the purchase of any of said real estate," such omission is a fatal defect in the sale and invalidates a deed made in pursuance of a purchase made at such sale.

2. Such an omission is not a mere irregularity, but a fatal omission, raising a presumption of the violation of section 9 of chapter 31 of the Code.

3. Parol evidence is not admissible to uphold or invalidate a tax deed, and it must be determined from the proceedings of record on which the deed is founded and from the face of the deed itself, whether the deed is valid.

4. A defective tax deed should not be set aside, unless the person entitled to have the same set aside, shall pay or tender to the purchaser, or his heirs, devisee or assignee, or the person holding under him, or some one or more of them, the purchase money paid for the real estate at the tax sale, and all the taxes since paid thereon for any year or years for which such person so claiming, or those under whom he claims, have not paid taxes thereon, and the costs of the survey or report, with interest on each of said sums from the date of the payment thereof until paid by such claimant.

5. When the taxes paid by a purchaser at a tax sale are a just charge upon the property sold, but the tax sale or deed is invalid because of irregularities in the proceedings, relief, in equity to set aside such sale or deed, will be conditioned upon the

reimbursement of the defendant, and the plaintiff must keep the tender good by pleading it and paying the money into court, if the amount is ascertainable, and whether it is or not, he must offer in his bill to pay it when ascertained.

6. Where the bill is insufficient but the proof shows the plaintiff is entitled to relief upon the cause of action imperfectly stated in the bill, and the decree is reversed, the cause will be remanded, with leave to amend the bill.

D. R. Melghen, Assignee, Plaintiff below, Plaintiff in error,
vs

D. B. Williams, Defendant below, Defendant in error.

Poffenberger, J.

From Wetzel County.

Reversed and remanded.

Syllabus.

1. A summons, issued by a justice of the peace, requiring the defendant to appear before him at his office, at a proper time therein specified, to answer the complaint of the plaintiff, "In a civil action for the recovery of money due on a judgment on the docket of J. A. Connelly, late a justice, to show cause why said judgment should not revive and be re-entered and execution issue thereon, in which the plaintiff will demand judgment for one hundred and sixty-two dollars and — cents, exclusive of interest and cost," is sufficient.

2. A judgment may form the basis and subject matter of a civil action before a justice of the peace, and such summons having all the requisites of a summons in such case, after striking out the words, "To show cause why said judgment should not revive and be re-entered and execution issue thereon," is amendable in that respect, and if the plaintiff files a complaint showing the object of the action to be the obtaining of a judgment and not the revival of the former judgment, such summons is thereby amended, that part of the summons which purports to set forth the cause of action being regarded as pleading in the action to that extent.

George Johnston and Laura A. Johnston,
Plaintiffs below,

vs

Annie M. Hunter, W. W. Rogers; Justice of the Peace for Ohio County, West Virginia, and Henry Stoehr, a Constable for said Ohio County, West Virginia,
Defendants Below.

From the Circuit Court of Ohio County.

Poffenbarger, J.

Affirmed.

Syllabus.

1. The writ of prohibition is purely jurisdictional and will not lie to correct errors or be allowed to usurp the functions of a writ of error or *certiorari*, or of the remedy by appeal.

2. The existence and legal constitution of a court is an inseparable part of its jurisdiction, and it has no power to hear and determine causes except at times and places authorized by law.

3. Except when expressly authorized by law, a justice of the peace cannot hear and determine a cause in a district other than the one for which he was elected.

4. When a justice of the peace makes his process in an action returnable before him in a district other than the one for which he was elected and in which he resides, he thereby does an act in excess of his lawful powers and the writ of prohibition lies to restrain him from proceeding to try such action without his district.

State

vs.

Hager

Brannon, P.

(From Boone County)

Judgment affirmed.

Syllabus.

1 An indictment under Sec. 9, Chapter 152, Code 1899, which charges that the defendant "did attempt" to murder another, is good, though it does not charge that the act constituting the attempt was done with intent to murder. The word 'attempt' implies the 'intent.'

2 Upon an indictment under Sec. 9, Chapter 152, Code 1899, for attempting to commit murder the verdict may convict of an attempt to commit murder in either the first or second degree, and the verdict not only may, but must, specify the degree of the murder attempted.

Adams

vs.

Baker

Brannon, P.

(From Tucker County)

Decree reversed, Case remanded.

Syllabus.

1 Where a sale of land either by deed or contract describes the tract as containing a given quantity, but says "be the same more or less, and is conveyed by the boundary, and not by the acre" there can be no abatement of purchase money for deficiency of quantity, in the absence of intentional fraud.

2 A general warranty in a deed related only to title, and does not warrant the quantity of land stated in it.

3 Delivery of a deed depends on the intent of the parties, and,

though not made in formal words, may be shown by circumstances. If the parties meet to make it, and read, sign and acknowledge it without reservation, this amounts to delivery.

Lewis vs. Crane,
Brannon, P.
(From Cabell County)

Decree reversed in part, cause remanded.

Syllabus.

A debtor of a partnership cannot apply his indebtedness to pay a debt due him from a member of the firm individually to the prejudice of firm creditors.

Melissa Dearing, et al., Plaintiff below, Appellee,
vs
Thomas T. Selvey, Executor of James Selvey, Appellant.
Poffenbarger, J.

From the Circuit Court of Taylor County.

Reversed and bill dismissed.

Syllabus.

1. An *ex parte* settlement, upon the face of which no error is apparent, is *prima facie* correct, and the burden of proof is on the plaintiff in attacking any item in such settlement to show that it is improper.

2. Where a will bequeaths and devises all of the testator's property, both real and personal, after the death of his widow, to his children, and at the time of the making of the will he owned certain real estate, but before his death, acquired additional land, the after acquired real estate passes to the devisees with the other.

3. If in such case the testator directs the executor of his will to sell the real estate owned by him at the time he made the will, describing it as "My said home farm," and the disposition of his estate is such that the purpose disclosed by the will cannot be effectuated without a sale of all the real estate of the testator, a power of sale as to such after acquired property is implied, and should be exercised by the executor.

4. Where a will provides that the executor shall not pay to a devisee her part of the testator's estate in money but shall invest it in land for the benefit of her and her children, and cause a deed for the same to be so made as to vest in her a life estate and the remainder in fee in her children, such provision creates a trust in favor of such devisee and her children, which it is the duty of the executor to perform.

5. Such devisee may waive the execution of such trust, on the part of the executor, by accepting from him a sum of money, equal to, or in excess of, the value of her prospective life estate, and, having done so, she is estopped from requiring the execution of the trust in accordance with the terms of the will.

6. One who is not entitled to any relief against an executor or an administrator cannot maintain a bill to surcharge and falsify the *ex parte* settlement of such fiduciary.

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MARCH, 1902.

THE 

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C. 587

THE BAR.

VOL. IX.

MARCH 1902.

NO. 3.

THE BAR.

OFFICIAL JOURNAL OF THE

West Virginia Bar Association.

Under the Editorial Charge of the Executive Council.

Entered at the Post Office at Morgantown as second-class mail matter.

Price 10c a Copy. \$1.00 a Year in Advance.

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Morgantown, W. Va.

An Open Forum.

This journal is intended to furnish an open forum to every lawyer for the discussion of any policy or proposition of interest to the Profession. It invites a free interchange of views upon all such topics whether they agree with the views of THE BAR or not.

THE BAR goes to every Court House in the State and is read by, probably, three-fourths of the lawyers of the State, and thus furnishes not only a ready medium of communication between members of the Profession, but of unification of the Profession on all matters of common concern, which is its prime mission.

Every clerk of a circuit court is the authorized agent of THE BAR in his county, and has the subscription bills in his possession, and will receive and receipt for all money due on that account, or for new subscriptions, and his receipt will always be a good acquittance for money due THE BAR.

THE BAR is furnished at the nominal rate of \$1.00 a year, which is less than the cost of publication, and we would like to have the name of every lawyer in the State on our subscription list.

That Settles It.

THE most important action taken by the Bar Association at its recent meeting was that of determining to support the Judicial Amendment.

Of course, this is the amendment in which the profession is specially interested, but some confusion arose as to its interpretation and relation to other parts of the constitution, and there was a doubt expressed as to whether it would accomplish its purpose.

We publish the views of Judge Reynolds upon these questions as presented in a carefully prepared paper read before the Association; as also another able article on the same line, in this issue of **THE BAR**. The amendment was carefully considered and discussed by the leading lawyers of the Association, and the conclusion was almost unanimous that it is sufficient to accomplish the purposes designed, and by an equally unanimous vote the Association formally decided to give its support to the amendment.

As we pointed out in the last issue of **THE BAR** there were but two courses open: either to vote it down and delay the benefits sought under the amendment, indefinitely, or take chances of a favorable interpretation after its adoption, by the Supreme Court. We are glad that the judgment of the Association sustains the validity of the proposed amendment; although it is extremely unfortunate that there should be any doubt, or room for doubt among lawyers about a proposition to change the organic law.

But the smoke having cleared away, the path is now perfectly plain, and there is but one duty upon the members of the profession, and that is to fall into line and give the amendment a united and vigorous support.

The Clarksburg Meeting of the State Bar Association.

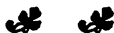
THE last meeting of the State Bar Association was one of the best in its history.

The personnel of the meeting was above the average, not only as to numbers but as to quality. Many of the most able lawyers of the State were in attendance. In fact, the bar of West Virginia "is no slouch," if we may use a vulgar phrase to make our meaning clear. It is coming to the front. In looking over that assemblage at Clarksburg one would be inclined to remark that it was a picked body of men. They were "good lookers." They were alert and ready and resourceful, and broad and up-to-date and well dressed and courteous and in good form as all-round men.

The Association was industrious and interested in the matters that came before it. They attended exclusively to business, and did more business than is usually done at a meeting. The topics considered were of unusual importance and the results reached were in each instance practical and valuable. The papers and addresses were very creditable both to the authors and auditors, and will add much of value to the literature of the Association. We were fortunate in securing Mr. Watson for the annual address. And right well did he fill the place. His address should be read, and will be read, by every lawyer in West Virginia. It is meaty and instructive and practical—full of good things for the members of the profession. On such an occasion, we hold it to be bad taste for the orator to confine himself to the discussion of abstruse abstract questions and topics. It is a semi-popular occasion demanding that character of address, and the matter and manner of Mr. Watson's address were well chosen.

The social features were most exquisite and complete. The Clarksburg bar "did itself proud" from start to finish—as we knew it would. The place provided for the meeting was

comfortable and elegant. The places provided for the *sleeping* would have been better if the local bar had provided them. Allow us to say in parenthesis, that the hotels of Clarksburg do not now, and have not heretofore measured up to the standard of the dignity of Clarksburg as a town, nor the reputation and æsthetic taste of its people in other directions. But that will be remedied shortly. Nevertheless, one can overlook a good deal in a town that is made up of a people so hospitable, courteous, kind, generous and refined as the people of that town. We are glad we went—we will be sure to go next time that Clarksburg is host.



The New Officials.

IN the absence of the stenographic report, there are a number of matters of more or less importance that drop out of sight in our report.

Among these we might say that Hon. Geo. E. Price, of Charleston, was elected President. He is one of the oldest and most honored men of the Association, and we need not add one of the ablest and most distinguished members of his profession in the State.

We do not recall the new Vice Presidents. The Treasurer, W. N. Miller, was re-elected, because the Association had tested the fact that he would not run away with its money if he had a chance. The Secretary, Hon. John W. Davis, was re-elected because the Association could not improve on him. The old Executive Council was re-elected because their amiable disposition as pack-horses had been abundantly established.

The new standing committees will be announced as soon as the President appoints them.

The place chosen for the next annual meeting is Wheeling, after a hot contest with Charleston and New Martinsville. We will get round to the other fellows in the course of time. The itinerant character of the Association is not the worst feature in its make-up.

Petitions Getting Dangerous.

THE New York *Sun* calls attention to the fact that petitions for an amendment to the Federal Constitution providing for the election of U. S. Senators by a popular vote are getting dangerously frequent, and may be more heavily loaded than the petitioners imagine.

Two-thirds of the States, at one time or another, in most cases without any attention or discussion, have passed resolutions favoring the election of Senators by the people, and the advocates of this scheme thought that they could quietly get the necessary two-thirds of the States to join in calling a convention with the ostensible purpose of amending the clause relating to Senators. Resolutions to that effect look innocent enough upon their face. Six states have already sent to Congress resolutions of this character, namely, Colorado, Nevada, Michigan, Oregon, Idaho and Montana. If twenty-four more can be induced to do the same without comprehending what is involved, Congress will be obliged to call a convention.

Should this come to pass a situation will arise so serious that the question of electing Senators by the people would sink into absolute insignificance. This is owing to the fact that a convention called to propose amendments to the Constitution can in no way be confined to a single amendment. The framers of the Constitution arranged for single amendments by enabling Congress to pass them and submit them to the states; but a convention opens the door to all possible amendment at once.

In other words, if the scheme now on foot succeeds, the country will suddenly find itself confronted with a convention to revise the entire Constitution of the United States.

It is difficult to conceive of a greater disaster to the prosperity

of the country and to the well-being of the American people and their institutions than would be involved in a general revision of the Constitution of the United States. Under that great instrument the country has grown and prospered for more than a hundred years. Its provisions are known to all men. Its clauses have been largely interpreted by the Supreme Court and their meaning settled. If the Constitution is now thrown open for revision, the entire Constitutional law representing the thought and experience of more than a century will be shaken and in large measure overthrown. There is no crazy scheme aimed at property or the courts or the currency which would not be precipitated upon the convention, and the long list of amendments now pending in Congress and recently published in *The Sun* gives but a faint idea of what would happen.

No detailed description is necessary to convince any sane man that it would be difficult to conceive of a greater misfortune than a general revision of the Constitution of the United States. This feeling will be enhanced when one remembers that in a Constitutional Convention the vote would be by states. The vote of Nevada would balance that of New York, and Idaho and Montana would weigh equally with Massachusetts and Illinois. It is not difficult to imagine what the result would be.

It is no answer to say that the outcome of such a revision would not meet with the assent of three-fourths of the States, and, therefore, there is no danger to be apprehended. The mere fact of throwing open the Constitution to general amendment would keep the entire country in agitation for many months.

These resolutions for a convention have made their appearance this winter in various States. The programme evidently was to smuggle them through under cover of the demand for electing Senators by the people, and in that way to bring about this convention. Publicity will probably be fatal to this vicious scheme, but it is to be hoped that members

of the State Legislatures everywhere will understand what is being attempted, and that under the pretence of seeking an amendment to the Constitution for the popular election of Senators a complete revision of the Constitution is threatened.

A matter of such importance ought to receive the most careful attention, and for the sake of our commercial calm and political stability resolutions of this character ought to be killed as soon as they make their appearance in any legislature.



The Proceedings.

WE fully expected to give the readers of THE BAR a stenographic report of the proceedings of the late meeting of the State Association. But the stenographer failed to furnish a transcript of his report in time, and therefore we had to content ourselves with giving simply the manuscripts of resolutions, etc., that were in the hands of the Secretary.

We very much regret this, because the proceedings and discussions of this meeting were unusually interesting and profitable, and this is the first time THE BAR has failed to give a stenographic report of a meeting. But we will have to console ourselves this time with the consideration that at least the action of the Association on the most important measures has been preserved.

Of course the formal papers and addresses will be printed in full in pamphlet form as usual. They are now in the hands of the printer, and will be ready in a short time, and be mailed to all the members. They are exceptionally valuable this year.



WE are under obligations for recent favors to Circuit Clerks L. L. Stidger, R. E. Talbott, W. B. Payne, W. H. Wilson, J. V. Bell, T. C. Whited, S. E. Bradley, and to G. W. McCauley and Harry Shaw.

The Courtesy (?) of Corporations.

IF a corporation employs an agent or officer without expressly fixing the period of his employment; and the employee discharges his duties without fault or complaint, yet another man has a pull on the corporation and the place of the employee is wanted by the corporation for the man with the pull, and the first man is turned down unceremoniously for the reason only that the second man may enjoy its emoluments, has the first man any right of action against the corporation?

This question seems to have arisen in the case of *Darrah vs. the Wheeling Ice Company* and was decided adversely to the employee.

The question is, has an employee any rights which a corporation is bound to respect?

Does the decision in the case in question leave the employee absolutely without redress for any damage he may suffer by an abrupt and unreasonable discharge, unless there is an express contract for a definite period?

If not, upon what kind of a hook can he hang his case other than that covered by the decision in question?



A justice of the peace named Martin, of Martinsburg, West Virginia—Martin of Martinsburg—has reprimanded, with much earnestness, certain giddy headed girls for giggling in church. Parson Brown, in charge of a Lutheran church out in the country, submitted to the giggling of these unruly girls, until, like his sermons, the thing grew monotonous, and he accordingly had them arrested and prosecuted. Some young men were arrested and prosecuted with them. The learned justice, being of opinion that the girls had been inveigled into giggling by the boys, dismissed the girls, on payment of costs; but the account does not say what he did with the boys.

SIXTEENTH ANNUAL SESSION

.....OF THE.....

WEST VIRGINIA STATE BAR ASSOCIATION,

HELD AT CLARKSBURG, FEBRUARY 12-13, 1902.

The members of the State Bar Association assembled at 2 p. m. in the commodious court-room of the Federal Building.

The meeting was called to order by President John Bassel, who proceeded to deliver the annual address. (See pamphlet.)

REPORT OF TREASURER.

The reports of standing committees being called for, Treasurer Miller presented the following report, which was referred to an auditing committee:

PARKERSBURG, W. Va., Feb. 12, 1902.

To the West Virginia Bar Association:

GENTLEMEN—I submit to you herewith an itemized statement of the receipts and disbursements as treasurer for the past year. The balance on hand according to my last report was \$986.43. The receipts for the last year have been \$700.50. Total \$1,686.93. The disbursements have amounted to \$636.99, leaving a balance in the treasury of \$1,049.94. There is due to the association from members on initiation fees and annual dues arrearages amounting to \$637. I submit herewith vouchers for my disbursements with the request that my accounts be audited and the vouchers returned to me.

Respectfully submitted,

W. N. MILLER, Treasurer.

W. N. Miller, Treasurer, in account with West Virginia Bar Association. 1901.

Feb. 4	To balance from 1900.....	\$ 986 43
	“ Tracy L. Jeffords, in. fee and dues 1901.....	5 00
	“ E. S. Doolittle “ “ “ “	5 00
	“ S. Bruce Hall, dues 1901 and previous	21 00
	“ A. G. Dayton, “ 1900 and 1901.....	6 00
	“ C. P. Dorr, “ 1900 and previous.....	18 00

Feb. 4	To	C. M. Alderson, dues 1901.....	3 00
	"	L. J. Williams, " 1901.....	3 00
	"	H. L. Van Sickle, in. fee and dues 1901.....	5 00
	"	Chas. S. Dice, " " " ".....	5 00
	"	John A. Preston, " " " ".....	5 00
	"	E. A. Hart, " " " 1900.....	5 00
	"	U. S. G. Pitzer, " " " ".....	5 00
	"	John Bassel, dues 1900.....	3 00
	"	Clyde B. Johnson, in. fee and dues 1901.....	5 00
	"	E. N. Nickolls, " " " ".....	5 00
	"	John A. Sheppard, " " " ".....	5 00
	"	W. F. Smith, " " " ".....	5 00
	"	W. S. Wysong, " " " ".....	5 00
	"	Felix Pifer, " " " 1900.....	5 00
	"	B. F. Meighen, dues 1901, etc.....	5 00
	"	F. W. Clark, " " " ".....	3 00
	"	Samuel V. Woods, in. fee and dues 1901.....	5 00
	"	Geo. Poffenbarger, " " " ".....	5 00
	"	J. W. Davis, dues 1900.....	3 00
	"	M. M. Thompson, dues 1900.....	3 00
	"	H. F. Smith, " " " ".....	3 00
Mch. 20	"	L. D. Isbell, " " " ".....	3 00
Apr. 16	"	E. G. Smith, " 1900-01.....	6 00
Oct. 5	"	J. Hop Woods, " 1901.....	3 00
7	"	Chas. J. Faulkner, " " " ".....	3 00
12	"	J. T. Hoke, " " " ".....	3 00
30	"	W. P. Willey, " " " ".....	3 00
	"	T. M. Garvin, " " " ".....	3 00
31	"	C. W. Dillon, " 1900-01.....	6 00
	"	J. Howard Holt, " 1901.....	3 00
Nov. 2	"	W. Mollohan, " " " ".....	3 00
15	"	Jas. L. Hamill, " " " ".....	3 00
19	"	F. M. Reynold, " " " ".....	3 00
Oct. 1	"	W. C. Clayton, " " " ".....	3 00
	"	W. W. Van Winkle, " " " ".....	3 00
	"	Geo. C. Sturgiss, " " " ".....	3 00
	"	Jackson V. Blair, " " " ".....	3 00
	"	W. G. Brown, Jr., " " " ".....	3 00
	"	John J. Davis, " " and previous.....	9 00
	"	W. P. Hubbard, " " " ".....	3 00
	"	C. C. Higginbotham, " " " ".....	3 00
	"	W. R. D. Dent, " " " ".....	3 00
	"	M. H. Dent, " " " ".....	3 00
	"	H. B. Gilkeson, " " " ".....	3 00
	"	R. W. Dalley, " " " ".....	3 00
	"	John W. Mason, " " " ".....	3 00
	"	George E. Price, " " " ".....	3 00
	"	M. Jackson, " " " ".....	3 00
	"	J. F. Brown, " " " ".....	3 00
	"	Thomas L. Broun, " " " ".....	3 00
	"	H. C. McWhorter, " " " ".....	3 00
	"	B. M. Ambler, " " " ".....	3 00
	"	W. N. Miller, " " " ".....	3 00
	"	T. S. Riley, " " " ".....	3 00
	"	H. M. Russell, " " " ".....	3 00
	"	Andrew Edmiston, " " " ".....	3 00

Oct. 1	To J. B. Summerville, dues '01	3 00
	“ Joseph Moreland, “	3 00
	“ B. L. Butcher, “	3 00
	“ Benj. Dailey, “	3 00
	“ C. L. Brown, “	3 00
	“ D. B. Lucas, “ and previous	6 00
	“ C. W. Dailey, “	3 00
	“ W. H. H. Flick, “	3 00
	“ P. J. Crogan, “	3 00
	“ B. S. Allison, “	3 00
	“ D. C. Westenhaver, “	3 00
	“ A. J. Clark, “	3 00
	“ Alfred Caldwell, “	3 00
	“ B. B. Dovenor, “	3 00
	“ L. F. Stifel, “	3 00
	“ Thayer Melvin, “ and previous	6 00
	“ E. Boyd Faulkner, “	3 00
	“ Wm. H. Hearne, “	3 00
	“ Braxton D. Gibson, “	3 00
	“ Geo. W. Atkinson, “	3 00
	“ C. D. Merrick, “	3 00
	“ V. B. Archer, “	3 00
	“ S. D. Turner, “	3 00
	“ J. F. Barron, “	3 00
	“ Ira E. Robinson, “	3 00
	“ W. W. Brannon, “	3 00
	“ J. D. Logan, “	3 00
	“ W. G. Wilson, “	3 00
	“ S. G. Smith, “	3 00
	“ W. S. Wiley, “	3 00
	“ B. F. Keller, “	3 00
	“ E. W. Knight, “	3 00
	“ G. W. McClintick, “	3 00
	“ W. Dallas Payne, “	3 00
	“ William G. Conley, “	3 00
	“ I. C. Herndon, “ and previous	6 00
	“ B. F. Meighen, bal. “	1 00
	“ A. N. Campbell, “	3 00
	“ Neil J. Fortney, “	3 00
	“ St. Geo. T. Brooke, “	3 00
	“ W. M. O. Dawson, “ and previous	4 00
	“ Forrest W. Brown, “	3 00
	“ John C. Palmer, Jr., “	3 00
	“ Henry C. Hervey, “	3 00
	“ Wm. McG. Hall, “	3 00
	“ W. C. Meyer, “	3 00
	“ W. B. McGary, “	3 00
	“ F. T. Martin, “	3 00
	“ Jas. W. Ewing, “	3 00
	“ Frank W. Nesbitt, “	3 00
	“ George E. Boyd, “	3 00
	“ C. W. Matheny “ and previous	9 00
	“ J. Alex Ewing, “	3 00
	“ C. E. Morris, “	3 00
	“ John Bassell “	3 00
	“ O. L. Holiday “	3 00

Oct. 1	To George B. Caldwell, dues' 01	3 00
	" John J. Coniff, " "	3 00
	" F. B. Enslow, " "	3 00
	" H. O. Simms, " "	3 00
	" John W. Davis, " "	3 00
	" O. F. Ayers, " "	3 00
	" Wm. McDonald, " "	3 00
	" J. F. Strader, " "	3 00
	" J. M. McWhorter, " "	3 00
	" O. W. Cramer, " "	3 00
	" Harvey F. Smith, " "	3 00
	" John Wehrle, " "	3 00
	" E. M. Showalter, " "	3 00
	" S. F. Glasscock, " "	3 00
	" W. J. White, " " and previous	9 00
	" William G. Peterkin, " "	3 00
	" A. G. Patton, " "	3 00
	" T. N. Reed, " "	3 00
	" F. O. Leftwich, " "	3 00
	" M. M. Thompson, " "	3 00
	" W. L. Ashby, " "	3 00
	" E. D. Talbott, " "	3 00
	" J. B. Koontz, " "	3 00
	" Z. T. Vinson, " "	3 00
	" H. Scott, Rucker, " "	3 00
	" M. H. Willis, " "	3 00
	" J. M. McWhorter, Dues 1901	3 00
	" Levin Smith, " "	3 00
	" John T. McGraw, " "	3 00
	" W. B. Thompson, " "	3 00
	" A. C. Nadenbousch, " "	3 00
	" Allen B. Noll, " "	3 00
	" W. C. Kilmer, " "	3 00
	" Harvey W. Harmer, " "	3 00
	" X. Poole, " "	3 00
	" Harry W. Bayer, " "	3 00
	" W. B. Cornwall, " "	3 00
	" James O. Frazer, " "	3 00
	" Mason G. Ambler, In. fee and dues 1901	5 00
	" Jas. S. McOluer, " " " " "	5 00
	" Reece Blizzard, " " " " "	5 00
	" Milliard F. Snyder, " " " " "	5 00
	" O. J. Chambers, " " " " "	5 00
	" H. P. Camden, " " " " "	5 00
	" W. Scott, " " " " "	5 00
	" J. G. St. Clair, " " " " "	5 00
	" W. W. Jackson, " " " " "	5 00
	" T. A. Brown, " " " " "	5 00
Oct. 6	" J. S. Spencer, Dues 1901	3 00
Oct. 9	" Richard B. McMahon, " " and previous	6 00
	" Robert White, " " and previous	3 00
	" Blaine W. Taylor, " " and previous	8 00
Oct. 10	" Chas. E. Hogg, " " "	9 00
Oct. 14	" Guy K. C. Allen, " " "	3 00
1902.		
Jan. 4	" A. M. Poundstone, " " "	3 00

Jan. 8	"	C. W. Osenton	dues 1901 and previous	6 00
	"	W. M. Straus, In.	fee and dues 1901	5 00
Feb. 7	"	Melville D. Post,	dues 1900 and 1901	6 00
	"	Edwin B. Kingsley, In.	fee and dues 1901	5 00
	"	John T. Cooper,	" " " "	5 00
Feb. 10	"	J. E. Proffit,	" " " "	5 00
	"	Geo. W. Johnson,	dues 1901	3 00
Feb. 11	"	J. M. Hamilton,	" "	3 00
	"	J. W. Vandervort,	" " and previous	12 00

Total \$1,686 93

CONTRA.

1901.				
Feb. 20	By pd.	H. H. Moss, Jr.,	Voucher No. 1	\$245 00
Mch. 7	"	J. W. Leese, Cashier,	" " 2	40 00
Mch. 20	"	Bessie B. Leech	" " 3	10 00
April 9	"	H. H. Moss, Cashier,	" " 4	35 00
May 9	"	State Journal Co.,	" " 5	2 00
May 20	"	Oscar A. Campbell	" " 6	50 00
July 16	"	E. M. Gilkeson, Cashier	" " 7	30 00
Aug. 7	"	H. H. Moss, Cashier	" " 8	30 00
Sept. 4	"	E. M. Gilkeson, Cashier,	" " 9	30 00
Oct. 16	"	W. P. Willey,	" " 10	5 00
Oct. 30	"	T. M. Garvin	" " 11	18 14
	"	Wheeling News Lito. Co.,	" " 12	101 25
	"	John J. Davis,	" " 13	30 60
1902.				
Feb. 8	"	Bessie B. Leech,	" " 14	10.00—\$636 99

Balance \$1,49 94

We have examined the forgoing report of the treasurer and find that the expenditures made and reported by him are correct and supported by proper vouchers.

C. W. DAILEY, }
F. M. REYNOLDS, } Auditing Committee.

REPORT OF COMMITTEE ON ADMISSIONS.

M. F. SNIDER: As a special committee on Membership I desire to present the names of the following candidates for admission, and can say of the Clarksburg applicants and the others that I know, that they are all right, and am willing to believe the ones I don't know are also:

Chas. W. Moore, Clarksburg.
L. C. Crile, "
B. G. Altizer, "
H. T. Houston, "
Haymond Maxwell, "
James E. Law, "
Claude W. Gore, "
Gen. B. S. Northcott, "
O. W. Lynch, "
John B. Swiger, "
U. G. Young, Buckhannon.

C. H. A. Kunst, Grafton.
 M. S. Hedges, Keyser.
 C. O. Strieby, Davis.
 H. D. Thurmond, Addison.
 O. W. O. Hardman, Middlebourne.
 A. M. Cunningham, Parsons.
 Homer W. Williams, Clarksburg.
 W. Frank Stout, "
 Benj. F. Bailey, Grafton.
 Nelson C. Hubbard, Wheeling.
 H. C. Richards, "
 Joseph R. Naylor "

On motion the Secretary was instructed to cast the vote of the association for the above named candidates, which being done, they were declared members.

THE JUDICIARY AMENDMENT.

C. W. DAILY: I move to take up topic for discussion No. 1, on the program, relative to the constitutional amendments. Mr. F. M. Reynolds is loaded to the neck on this subject.

F. M. REYNOLDS: Mr. Chairman and gentlemen of the Bar Association, I want to relieve you of the impression that might have been made by my brother Daily, when he named me as one loaded upon these constitutional amendments. I want to say that I am not especially loaded, but I do feel an interest in these questions, and having been connected with their proposal by the Legislature of this State in the session of 1901, I presume we might look upon it to some extent as a kind of personal privilege on my part to have something to say about these constitutional amendments, and especially one of them. I hope that I am not addressing a prejudiced jury; I always do like, or rather dislike, a jury in any case that have made up their minds before hand, and I hope that if you have made up your minds on this question, I hope you will try and free your minds from this prior judgment. I hate to resort to a manuscript for the purpose of making a speech, but before I came here for the sake of accuracy I took down what I wanted to say on this judicial amendment, and therefore you will pardon me for reading from this paper relating to this particular amendment; I mean the one relating to the judicial amendment.

MR. REYNOLDS' ADDRESS.

As there has been considerable discussion among the members of the Bar and in the public prints with regard to the effect of the proposed amendment of the constitution of this State generally styled "The Judicial Amendment," and as the subject has been somewhat befogged and mystified by this discussion on the part of those who evidently have not closely considered the subject, I deem it proper that I should endeavor as far as I can to clear away this mist and fog, so that there may be a better understanding of the exact situation of this matter.

As a member of the House of Delegates of this State at the session

of 1901 I introduced into that body what was known as House Joint Resolution No. 15 in the following words: "Resolved by the Legislature of West Virginia, two-thirds of the members elected to each house concurring therein, that the following be proposed as an amendment to the constitution of this State:

"The Supreme Court of Appeals shall consist of five judges. Those judges in office when this amendment takes effect shall continue in office until their terms shall expire, and the Legislature shall provide for the election of an additional judge of said court at the next general election, whose term shall begin on the first day of January, one thousand nine hundred and three, and the Governor shall, as for a vacancy, appoint a judge of said court to hold office until the first day of January, one thousand nine hundred and five. The judges of the Supreme Court of Appeals and of the Circuit Court shall receive such salaries as shall be fixed by law for those now in or those hereafter to come into office."

The joint resolution was passed by the House of Delegates on the 6th day of February, 1901, after being read three times in the House and reported with recommendation to pass by the Judiciary Committee. As copied above, the resolution was passed by the House, ayes 55, noes none, just as given on page 553, House Journal 1901.

This resolution as passed by the House was sent over to the Senate to be concurred in by that body, and it was passed by the Senate after being verbally amended as to the enacting clause and the body of the resolution was amended as to one word, and that was in section 2, line 9, by striking out the word "three" and inserting in lieu thereof the word "five." (See Senate Journal, pages 341-342.)

After being so amended the resolution was held up in the Senate for want of a constitutional two-third majority vote until the 19th day of February, when it was passed by the Senate, sent back to the House, when the amendment made by the Senate was concurred in by the House. It will be noticed that when the resolution was passed by the Senate it had been divided into two sections. "That the following be proposed as an amendment to the constitution of this State" was numbered as section 1, and the residue of the resolution as a second section. This, I presume, was done by the printer for convenience in numbering the lines, and these numbers 1 and 2 constitute no part of the resolution.

Now the important question arises as to the effect of this amendment to the constitution if adopted by vote of the people of the State. It will be seen at once that the proposed amendment does not refer to any particular section or article of the constitution, and does not purport to amend any particular section or article; it only purports to amend the constitution of this State. How far would it amend the present constitution if it is adopted? The answer to this question is, that it amends the present constitution so far as it conflicts therewith, and no further. There are only two particulars (besides providing for filling the office of a fifth judge), in which the present constitution is amended, namely, increasing the number of judges of which the Court of Appeals shall consist, from four to five, and pro-

viding for fixing by law the salaries of the judges now in office, both Circuit and Supreme Court judges, or those to come into office. The number of judges of which the Court of Appeals shall at present consist is fixed by section 2 of article 8 of the constitution. The salaries the judges of the courts shall receive is fixed by section 16 of the same article. The sections of this article referred to read as follows:

2. The Supreme Court of Appeals shall consist of four judges, any three of whom shall be a quorum for the transaction of business. They shall be elected by the voters of the State and hold their offices for the term of twelve years, unless sooner removed in the manner prescribed by this constitution, except that the judges in office when this article takes effect shall remain therein until the expiration of their present term of office.

16. All judges shall be commissioned by the Governor. The salary of a judge of the Supreme Court of Appeals shall be two thousand two hundred dollars per annum, and that of a judge of the Circuit Court shall be one thousand eight hundred dollars per annum, and each shall receive the same mileage as members of the Legislature: *Provided*, that Ohio County may pay an additional sum per annum to the judges of the Circuit Court thereof; but such allowance shall not be increased or diminished during the term of office of the judges to whom it may have been made. No judge during his term of office shall practice the profession of law or hold any other office, appointment or public trust under this or any other government, and the acceptance thereof shall vacate his judicial office. Nor shall he, during his continuance therein, be eligible to any political office.

All that is in both of these sections as now in the constitution will remain in full force except in the two particulars mentioned in the resolution and pointed out above. The rule of law applicable to this construction of the effect of the amendment is a well-known rule, which will be found laid down in the American and English Encyclopedia of Law, volume 23, page 479, as follows: "If two statutes on the same subject are mutually repugnant and irreconcilable, the latter act without any repealing clause in the absence of express intent to the contrary, is a repeal of the earlier. But even in such case the old law is repealed by implication only *pro tanto* to the extent of the repugnancy, and generally speaking, such parts of the prior act as may be incorporated into the subsequent statute consistently therewith, must be considered in force." This rule is supported by decisions in nearly all, if not every State in the Union, and by cases in West Virginia and Virginia. *State vs. Cain*, 8th W. Va., p. 730; *Fields vs. Bennett, Auditor*, 8th W. Va., p. 74; *Forqueran vs. Donnally*, 7th W. Va., p. 414; *Fox vs. Commonwealth*, 16 Grat. 10; *Hogan vs. Guigon*, 29 Grat. 705. The same rule we would apply to the construction of statutes upon this subject, would without question, apply to the construction of constitutional amendments.

My attention has been called to an article written by Col. R. E. Fast, and published in the February number of *THE BAR*, page 69, and endorsed in an article published in the same number by the editor of that journal, page 59. Col. Fast's argument, it will be noticed, is

based on a misquotation of the resolution proposing the amendment. He says: "At the last session of the Legislature the following amendment was proposed to the constitution of the State, which is to be voted on for ratification or rejection at the next election:

"Section 2 of article 8 to be amended so as to read as follows:

"Section 2. The Supreme Court of Appeals shall consist of five judges," etc., here he quotes the remainder of the resolution correctly. It will be seen at a glance that the proposed amendment as passed by the Legislature and quoted above by me does not amend in terms section 2 of article 8 of the constitution, or any other section or article; neither is it a substitute for section 2 alone, but it simply amends the constitution. I have shown by the foregoing how far the amendment, if adopted, amends the present constitution. Col. Fast further says in his argument that the amendment is a substitute for the whole of section 2 of article 8, and proceeds to argue that the three essential provisions of section 2 as it now stands are omitted from the amendment, and he quotes these omitted parts.

1. That the judges shall be elected by the voters of the State.
2. That the judges shall hold their offices for twelve years.
3. That the judge shall hold his office during his term "unless sooner removed in the manner prescribed by this constitution."

As Col. Fast's quotation of the resolution is wrong, and the premises upon which he bases his argument are false, his conclusions are necessarily false.

The fact is, that in the three particulars just enumerated, the present provisions of the constitution are unaffected by the amendment, so that if the amendment is adopted the judges will be elected by the voters of the State; they will hold their offices for twelve years and they will hold their offices during their terms unless sooner removed in the manner prescribed by the constitution.

If this amendment is adopted by the vote of the people the Supreme Court of Appeals thereafter will consist of five judges. The judges will be elected by the voters of the State; they will hold their offices for twelve years and continue to hold their offices during their terms unless sooner removed in the manner prescribed by the constitution, and the Legislature will have the power under this amendment to fix the salaries of the judges of the Supreme and Circuit Courts now in office, as well as those to come into office. The inquiry may be made as to why sections 2 and 16 of article 8 of the constitution were not re-enacted in the proposed amendment as a whole. This was not done nor attempted to be done, for the obvious reason that if the amendment had undertaken to re-enact both of these sections, it would have opened up numerous questions and would have endangered the passage of any amendment on this subject by the Legislature. The need of having the Supreme Court of the State increased to the number of five judges, and giving to the judges both of the Supreme Court and the Circuit Court more salaries than are allowed by the present constitution, was felt by every one who thought upon the question, but if the effort had been made to re-enact both of these sections entire there would have been a division of opinion upon several

questions that would have been raised and most likely would have defeated the end aimed at. It will be seen by referring to the proceedings of the Senate that it was a difficult matter to get the amendment through in a simple form covering these two questions. If it had been loaded down with numerous other questions as to appointment or election of judges; as to the length of the term they should hold their office; as to how they should be removed from office; the fixing of the salaries of the judges in the resolution, and other questions that would have necessarily arisen, it can be readily seen how difficult it might have been to have had any amendment upon this subject adopted by the Legislature.

It has been stated that no one assumes the responsibility for this amendment. I will say just here that I readily and frankly admit my responsibility for offering the amendment, and have no reason to doubt that it was wise and proper and in the best form it could have been made. It is true I did not write the amendment myself, but it was written by one who was learned in the law and with more experience than myself, and evidently prepared with greater care, more accuracy, and after much more reflection than was given to the subject by the writers in *THE BAR* heretofore referred to. I will say just here in passing that we might reasonably have expected from the two professors in the West Virginia University, who are the authors of these articles more care, greater legal learning, fuller consideration and more accuracy in the preparation of their criticisms of this amendment than their articles display.

The further criticism is made upon this amendment that it does not effect the purpose of giving to the Legislature the power to increase the salaries of the judges of the Supreme and Circuit Courts. It is averred that, that part of the amendment which says, "The judges of the Supreme Court of Appeals, and of the Circuit Court shall receive such salaries as shall be fixed by law for those now in or those hereafter to come into office," is not in conflict with section 16 of article 8 of the constitution.

Again Col. Fast commits an error, growing out of his misquotation of the amendment. The amendment if adopted will be in direct conflict with so much of section 16 of article 8 as fixes the salaries of the judges, and will give to the Legislature the power to fix by "law" the salaries of the judges; such was the purpose of that part of the amendment just quoted, and it will undoubtedly accomplish its purpose. It is contended that the use of the word "law" in the amendment will include the constitution as well as an act of the Legislature. Even if this is granted as a general rule to be correct, it is equally true that where the constitution prescribes certain things to be done or regulated by law, an act of the Legislature is included under the word "law" as well as the constitution. What is there now in the constitution of this State if the proposed amendment is adopted to prevent the Legislature from fixing by "law" the salaries of the judges? If this was not the purpose of the part of the amendment last quoted then it accomplished nothing. The very language used shows a manifest intention to give to the Legislature the power to fix by "law" the

salaries of the judges, not only for those to come into office, but also for those now in office. But for this amendment another section of the constitution would forbid the changing of the salaries of any officer during his term of office.

I presume Col. Fast was led into the mistake he made in quoting the proposed amendment by what he found in the act of the Legislature submitting this amendment, as well as others, for ratification or rejection, to a vote of the people at the next general election. I frankly admit that in the preparation of that act, which will be found in the acts of the Legislature of 1901, pages 451-452, some clerk, equally as careless as the gentleman in his quotation and criticism, in copying the proposed amendment, misquotes it and undertakes to say in referring to it as the third proposed amendment, that "section 2 of article 8 to be amended so as to read as follows: 'Section 2. The Supreme Court of Appeals shall consist of five judges, etc.' " This was simply a misquotation of the amendment itself; it will be found in the same acts at page 462. This misquotation is a mere clerical error and can have no effect upon the amendment itself. It will be further seen from the same act, page 454, that in giving directions as to how the ballot should be printed and prepared it is referred to as:

(3) Judicial Amendment.

Amending Sections 2 and 16 of Article 8.

For Ratification.

For Rejection.

In this act the title and other sections refer to the amendment as amending sections 2 and 16 of article 8 of the constitution.

It will be readily seen that here is a conflict in the act itself submitting this amendment, as to what sections and articles of the constitution it amends. It does amend by implication sections 2 and 16 of 8 so far only as the amendment is in conflict with those sections, but no further.

Now when we come to ascertain how much and what part of sections 2 and 16 of article 8 are amended, we must look to the amendment itself. It will speak for itself. It will be the guide by which we must determine how much, and what parts of these two sections are amended by it.

No court can have any difficulty in reaching the conclusion that the amendment must speak for itself. And from the wording of it, it must be determined how far it amends the constitution of this State. If the court examines chapter 153 of the acts of 1901, providing for the submission of the proposed amendment, the clerical error will so clearly appear that the court, under well known principles, will look to the proposed amendment and to that alone and such clerical error can have no effect.

I may be asked whether or not this error made in quoting the proposed amendment in the act of the Legislature submitting it to a vote of the people, for ratification or rejection, may mislead the voters as to the precise question to be voted upon? My answer to this question will be in the negative, for the reason that the sixth section of said act requires the Governor to cause the proposed amendment to be

published at least three months prior to the election in a newspaper in every county in which one is printed. In this notice the Governor should, and doubtless will, publish correctly the proposed amendment and the designation of the form of the ballot to be used in voting on the question as set out in the act, and as I have set it out in this paper, and which is correct and not misleading. Every voter casting his ballot may examine the proposed amendment and he can readily see to what extent the constitution will be amended if the proposed amendment is adopted. Thus we have a plain, simple and inexpensive mode of amending the constitution.

I wish to call attention to the fact that fifteen articles of amendment have been added to the constitution of the United States since the original constitution was adopted. No one of these amendments makes any reference to any particular section or article of the constitution amended; most of them are new provisions or additions to the constitution. Some change previously existing sections. The twelfth amendment relating to the election of President and Vice-President changes all of sub-section 3 of section 1 of article 2 of the constitution.

The question as to how far the fourteenth amendment changes the previously existing constitution has not been fully determined in many respects. How far does section 2 of the fourteenth amendment change sub-section 3 of section 2 of article 1 of the constitution relating to the representation in Congress, direct taxes and the census? This is a question I will not undertake to answer at this time, but there can be no doubt that so much of said sub-section 3 of section 2 of article 1 as relates to direct taxes remains a part of the constitution of the United States. See the opinion of the court in the Income Tax cases, 158 U. S. 601. I desire to call especial attention to the question as to how far the fourteenth amendment changes the previously existing constitution, particularly the fifth amendment. Any lawyer will readily understand that when you come to construe and ascertain the full scope and meaning of the fourteenth amendment of the constitution you must look at many provisions of the constitution and amendments thereto, existing before the adoption of the fourteenth amendment.

I need only refer the members of the legal profession to the learned and able discussion of these questions as found in Judge Henry Brannon's new and exhaustive work on the fourteenth amendment to the constitution of the United States. By reading the author's preface to that work, some idea will be obtained as to how far the fourteenth amendment effects a change in the previously existing constitution of the United States.

It may be proper for me to give some explanation as to how the clerical error was made in the act of the Legislature of 1901, submitting the proposed judicial amendment to the voters of the State. I was not chairman of the Judiciary Committee having this bill in charge, but the facts as I remember them are: That this judicial amendment did not pass the Senate until very near the close of the session. The frame-work of a bill providing for the submission of this and three other amendments had been proposed. At least two of these

amendments had been so drawn as to re-enact certain sections of the constitution. The form of the act relating to these amendments should not have been the same as the form relating to the judicial amendment, and doubtless some clerk in copying this bill followed the form, with reference to the judicial amendment, as it appeared with reference to the others and thus fell into the error. It may be asked why this was not detected. My answer to that question is simply this: The bill was not printed; it had to be rushed through both Houses in great haste; while read by the clerk it could not be heard by the members, and in this way I think the error was not detected. As I have shown before, the clerical error, for such it undoubtedly was, cannot effect the validity of the amendment if adopted by vote of the people. If the question ever comes before the courts they will doubtless go as far as the law will allow to carry out the intention of the people and in giving effect to their will.

We conclude from what has been said that the only question about which there can be any doubt is whether the act of the Legislature substantially complies with the requirement of the constitution, that the amendment proposed shall be submitted to the vote of the people. We have seen that this has been substantially done, notwithstanding the error committed in copying the amendment into the act. The act of submission cannot change the amendment. The amendment must have a two-third vote of all the members elected to each House in order to pass it. The act submitting it to a vote only requires a majority of a quorum of each House to pass it. It was unnecessary, in our view, to copy the amendment into the act submitting it, and it could have been identified by reference to the number of the joint resolution proposing it, and under which it received the concurrence of the necessary two-thirds of the members elected to each House. An error in copying it could not change it. If the act submitting the amendment has enough in it to show in substance and effect that it has been submitted to a vote of the people, it is all that is required. The intention of the Legislature to submit to a vote the amendment as adopted is plain, when all of the provisions of the act are looked to. The will of the people could not be defeated by such an error, if the amendment as proposed is voted upon and ratified by them.

That is the duty of the Bar Association in reference to this proposed amendment? My view is that we ought to advocate and work for its adoption. As there are only four members of the Supreme Court at present, an equal division among them results in a deadlock, and it might result in having important questions undecided for a long time, and might also result in having a construction of certain law in one circuit different from the construction in another. The work of the Supreme Court is growing rapidly and is more than the four judges can possibly have time to do, and do with that care its importance demands. More time should be given by the whole court together in considering cases to be decided. They cannot decide cases until so long after an oral argument that it will be forgotten, and thus such arguments are rendered useless.

This State has grown vastly since the constitution was adopted

fixing the number of judges of the Supreme Court at four, and legal business is rapidly on the increase. The number and importance of the cases and questions to be decided by the Supreme Court is greatly in excess of what it was twenty-five or thirty years ago. The salary the judges now receive is ridiculously small. The pay does not nearly compensate for the services. This fact is little less than a shame and disgrace to our rich and growing State.

During the reading of the above paper George E. Price said, "What is the effect of the Senate amendment on that resolution?"

MR. REYNOLDS: His term shall begin the 1st day of January, 1903; it was a mere mistake in putting three in place of five. That was amended in the Senate.

M. F. SNIDER: His term would expire when the Governor's did?

MR. REYNOLDS: Yes, sir. When we come to consider that the judges of your courts have the lives, liberty and property of the people of the State within their power and domain, we can at once see how important it is to have these questions decided, decided quickly and decided right. Is there a member of our profession here today who does not know that there is conflict after conflict until I cannot undertake to advise my clients any more what the law of this country is. I say we ought to advocate this amendment. Some gentlemen may say that the people ought to be consulted. I say that it is for the interest of the people that it ought to be adopted. I have no concern in this more than any member of the Bar, but I do believe and think that the fact that we have only four judges of our Supreme Court, and for the salaries of only \$2,200 a year, it is discouraging to the young members of the profession of our State, and does not inspire a man to qualify himself for these high and honorable offices. I might be asked, "Suppose this amendment is adopted by the vote of the people, what is the effect of it?" It could only have two effects, that it was adopted as part of the fundamental law of the State, or it was not. The only question is, "Does that resolution submit this question to the vote of the people on account of that error?" And if my brother Editor of THE BAR and my brother Fast had discussed this question from that view point, I would not perhaps be as harsh as I have been. If they had attacked this amendment's character and opposed its adoption by the Legislature and submitted it as it was voted on by the Legislature and then submitted to the people, they might have had something to argue about it. I think it is unfair, and I regret the Editor of THE BAR is not present to hear what I say, and I only want to say that he was hasty in his conclusion after reading the article of Col. Fast, when he said it was of no effect. He was at least hasty if nothing more. I want to impress in conclusion this fact, that if this amendment is adopted, my judgment is that a court of justice will go a long way to ascertain whether the will of the people cannot be given effect, but if the court decide against it we are no worse off than we are at the present.

E. M. SHOWALTER: Mr. Reynolds, have you examined whether the error in the printed bill occurs in the engrossed bill on file?

MR. REYNOLDS: No, sir, I have not examined that.

MR. PRICE: I have had very little time to examine these proposed constitutional amendments with any care until my arrival here to attend this meeting. We are so much taken up down in the southern end of the State trying to make a living, that it isn't often we stop to consider a constitutional amendment, but since I came here with the assistance of my brother Daily, who you will hear from as soon as I take my seat, I did go over these amendments and give some consideration to the questions involved, and I am prepared to say that I agree substantially with the conclusions that have been announced by Mr. Reynolds. My impression before I examined carefully the amendments and the acts, were rather against the conclusions I have arrived at, and I think a careful consideration given it when made by anyone will lead to the conclusion that these amendments as originally proposed and passed by the two houses will have the effect to amend by implication sections 2 and 16, leaving in effect such provisions of those two sections as are not in conflict with the proposed amendments, so that the trouble that has been suggested that there would be no fixed terms for the judges and that there would be no method by which they would be elected or chosen, falls to the ground if that conclusion is correct. It is competent to amend a statute by not simply re-enacting a whole section as is provided in our constitution, but in any other way that indicates the change is to be made. It may be said that a certain word be inserted in a certain line after another certain word, or by striking out another provision, and we could adopt that method in our constitution, except we have in our constitution that we shall never amend any law without showing how it will stand afterwards. The Legislature can propose to the people an amendment in any form that it may seem proper, it can propose certain language to be an amendment to the constitution without saying what provisions of the constitution shall be amended, without saying what its place in the amendment shall be, or without saying what it is in conflict with in any respect, but if that is adopted it shall then become the province of the courts to ascertain what changes it has effected. I see no trouble at all holding that if this amendment as it was originally passed by a two-thirds vote of the two houses, if you take the language of the proposed amendment itself as voted on by the two houses, and say that shall be an amendment of the constitution, as it amends without saying what is to be effected only so far as the language indicates, and every part of the constitution that is not in conflict with its language will stand, whether it is the 16th or any other section of the constitution. That is evidently what the Legislature had in mind. It was not intended to cover all those two sections, but to cover only two or three points, leaving the others to stand, and it has done that. I don't see any trouble on these two questions unless it arises out of the incongruity in the act by which the proposed amendment is submitted to a vote of the people. In examining the constitution you will find that the proposed amendment shall require a two-thirds majority in each house on three different days, and it has been held that the constitutional provision cannot be dispensed with. Now that is a proposed amendment to the constitu-

tion. The same section provides that after this has been done it shall be the duty of the Legislature to provide by law for the submitting of the proposed amendment to the people; whether this latter provision was of such binding effect that if the Legislature should fail to provide for the submitting of an amendment that had passed the two houses would make it impossible for its adoption I don't know. There is a question there, whether when both houses have passed an amendment by a two-thirds vote, whether the people should vote on it before the next session of the Legislature, it would then become a part of the constitution, I don't know. I am inclined to think that to put the amendment before the people by the same Legislature is as essential as putting it through the Legislature by a two-thirds vote. Certainly the majority of the Legislature after two-thirds of both houses have adopted the amendment by vote which they submit it, won't change the effect of the amendment itself or rob it of its proper form. The trouble here is that when this Legislature went to pass a law to submit this amendment it describes it and says "that section 2 of article 16 shall be amended to read as follows." If that is taken literally this amendment takes the place of section 2, and if that was all there was of this act submitting it to the people, I have grave doubts if the courts would uphold it if written in that way, but as pointed out by Mr. Reynolds the title of this act (here the speaker gives exact words of title of act.) In referring in the title to the fact that this amendment affects not only section 2 but 16, and when it describes the bill it says amending sections 2 and 16, and when it gives the certificate of the judges of election it describes it again as an amendment to sections 2 and 16, and whenever the amendment is referred to except this one place, it is described as an amendment to sections 2 and 16, and then you can see by looking at it that it is in fact an amendment to sections 2 and 16, and I think therefore any court, even the Court of Appeals of West Virginia, must come to the conclusion manifestly and clearly that it was the intention of the Legislature to submit that as an amendment affecting these two sections, and would leave them in force so far as they don't affect it. I agree with brother Reynolds that these amendments should be made and am willing to accept his remedy, and I am certainly in favor of increasing the number of judges, and I therefore expect to support that amendment. I take pleasure in introducing the gentleman from Randolph County, Mr. Daily.

C. W. DAILY: I oughtn't to attempt to make any remarks on this question, because in the Traders' Hotel from half-past ten I gave my views to Messrs. Price and Reynolds and they appropriated my speech. I came here with the understanding I would be asked to express the views I gave them on that occasion, and I suggested Mr. Reynolds, because he had heard me talk on the subject. My speech has been made, but I am not entirely satisfied with the way it has been made. I have no hesitancy in accepting Mr. Reynolds views or conclusions to the effect that this resolution as adopted by a two-thirds vote of the house of the Legislature has affected sections 2 and 6 of article 8, and leaving them in effect so far as these sections are connected with it. As

soon as that view was expressed it removed all doubts if I actually ever had any. The only idea I ever had of anything causing trouble was the one referred to by Mr. Price, that a proposed constitutional amendment could not be gotten before the people merely because the resolution proposing the change had been adopted by a two-thirds vote of the house. That it needed afterwards the manner in which it should be submitted. Here the two-thirds of each house offer a certain resolution to amend two sections, but not to absolutely take the place of either. The bill proposing it in one section certainly proposes it as a substitute for number two. Does it ever properly get before the people for a vote? I see it in this way, it is important to have a change proposed by the Legislature. Is it properly before the people at this time? If the Legislature cannot change the form and effect of the provisions amended by any words they insert in their stead, and when they submit it they submit the amendment actually proposed, then it becomes a part of the constitution, although they may have made some mistakes. Then this will become a part of the constitution and will leave the places not inconsistent part of our organic law. Suppose they hold it not good when it goes to the Supreme Court, then they will only say it does not effect the constitution at all, this is one thing and the Legislature proposed another thing, then we will not be hurt, but I don't think it will be done. I am in favor of voting for the resolution as proposed and intended by the Legislature and submitted to the people. I could have made a long speech if my views had not been appropriated.

K. G. SMITH: I would like to hear from a gentleman that has had a long experience on all constitutional questions, Mr. Davis.

JOHN J. DAVIS: I beg to be excused at this time after listening to the very convincing and conclusive speeches of the gentlemen who have spoken on it. There is another reason why I am not willing to speak on it, because I have not given the matter that consideration that would give what I say very great weight. Some points made by my brother Reynolds I do not agree with him on, but in the main, however, I think his views are probably correct, therefore I do not want to enter into the matter that might protract the debate, especially as I see in the faces before me that they are willing to go and vote for this amendment. I think there should be five judges on the bench so that we would at least have questions settled by a majority of the court, and not have important questions left indefinitely when brought before it. There are other reasons why the amendment is satisfactory, for I agree with my brother Reynolds about what he said about the various discrepancies in the decisions of the Court of Appeals of West Virginia, and it is very difficult to advise a client on a question. Recently the court has reversed three decisions by them, one from this county, the case of Harbert vs. B. & O. railroad. The case began before a justice of the peace, was taken by a writ of certiorari to the Circuit Court, the judgment affirmed, the railroad company applied for an appeal and got it. The court had before decided that certiorari was not the proper remedy, but if the Circuit Court decided to consider his certiorari an appeal it could do so. The case

was sent back giving appellant the right to treat his certiorari as an appeal or not. I speak of that as one of the various times when the court has reversed itself. It is very difficult sometimes to tell what the court has decided or will decide. I hope we will get a court of five justices that will settle the law. I don't concur in all that has been said, but I don't desire to discuss it. I might take issue with my friend on the 14th amendment, and might even take issue with my distinguished friend, Judge Brannon. I have gotten all the glory to be gotten out of it heretofore, and want to leave it to the younger members of the bar.

C. W. DAILY: Mr. Clayton heard me talk and I expect he can speak on it, too.

WM. C. CLAYTON: Mr. Daily says Mr. Reynolds has made his speech, Mr. Price made it, too, then he made it himself, and I don't see why the members of the bar would want me to make it over again.

CODE OF ETHICS.

C. W. DAILY: I suggest the report of the Code of Ethics be presented.

T. P. JACOBS: I want to call attention to a typographical error in section 30 of the Code as reported, on the 14th line at the end of the section, the word "liberal" should be "illiberal." As it is it is nonsensical. (Reads section.) (Reads report of Com.) I believe, sir, that is all I have to report, except to say that those brothers who have THE BAR have the full report and text of the committee. (See pamphlet.)

A. M. POUNDSTONE: Mr. President, I move that the report be adopted.

C. W. DAILY: It is true that most of the members read the report in the January number of THE BAR, but I expect that most of the members of the association like myself read it about the time it came out and are not familiar enough with it to vote without hearing it again, and suggest that Capt. Poundstone withdraw that motion and make one for it to be read section by section so that comments can be made on it. I regard this as the most important matter that this association will have before it this session. I suggest, Captain, if you hadn't better make that motion.

A. M. POUNDSTONE: I will say to brother Daily that I was moved to make the motion I did that I thought the members of the association were all familiar with the Code of Ethics as published in THE BAR. Perhaps I was wrong, and presuming that I was, I will move for the reading of this Code of Ethics. (Motion seconded, carried and Code read by secretary.)

REPORT OF EXECUTIVE COUNCIL.

The Executive Council reported the total receipts of the West Virginia Bar for the year to be \$685.83, and the total expenses \$595.33, leaving a balance to credit of \$90.50.

This statement includes only cash receipts and expenditures. The earnings of THE BAR during the year, including good accounts outstanding, are considerably in excess of expenses. The receipts from

subscriptions have increased since the enlargement of the journal, and the aggregate collection from this source is in excess of any past year.

The expenses of publication in the new form increased the expenses for printing to the amount of \$170, and for mailage about \$10.

The financial exhibit for the year is the best THE BAR has been able to make since its publication began.

In order to relieve the burden of collecting subscriptions, which has to be done entirely through the mail, the Council recommended that the annual dues of members be increased by the addition of one dollar, and THE BAR hereafter be sent free to all members of the Association. Nearly all members are now subscribers, and all of them ought to be, so that adding one dollar to the annual dues, would not be imposing any additional tax if they get THE BAR free, but would be a convenience to them and to us by making one payment to the Treasurer for both. Then let one-fourth of the annual dues be set apart for the expenses of THE BAR.

This would require a change in the constitution, which might be amended as follows:

Amend section 18 of the constitution to read as follows:

The fee for admission to membership shall be \$5, which shall in all cases accompany the application for membership. The annual dues shall be \$4, the payment of which shall entitle each member to receive one copy of the journal and all the regular publications of the Association free of charge. The Treasurer shall annually set apart and pay over to the Executive Council one-fourth of the sum collected as annual dues, which shall be used as a fund for paying the expenses of publishing the journal of the Association.

The Council also recommends that hereafter THE BAR be issued in ten instead of twelve numbers for the year. This is the plan of some of the leading law journals of the country, and of what is probably the first law journal of the country, *The American Law Review*. If the June and July numbers and the August and September numbers are consolidated it will reduce the labor and expense of publication to some extent, and give equal satisfaction, I think, to the subscribers.

A vote being taken on the question of adopting the amendment proposed to the constitution, and the other recommendation of the Council, they were declared adopted.

MISCELLANEOUS RESOLUTIONS.

THE JUDICIAL AMENDMENT.

The following resolutions were offered by Judge Jacobs and adopted:

WHEREAS, There is no doubt as to the legality of the proposed amendment to the constitution of this State known as the Judicial Amendment growing out of a misconception of the true import of the joint resolution proposing the said amendment, and

WHEREAS, We believe there is no illegality in the said amendment, and

WHEREAS, There is a pressing need of the adoption of said amendment, not only to the Bar of the State, but more especially to the citizens of the State, whose life, liberties and property are involved. Therefore

Resolved, By the Bar Association of this State, that we favor the adoption of the said amendment by the people and use our best efforts to that end.

Resolved, That the paper read on yesterday by Judge Reynolds be adopted by the Association as expressive of its opinion on the propriety of adopting the judicial amendment to the constitution.

THE PRESIDENT'S ADDRESS.

Resolution offered by Mr. Talbott and adopted:

Resolved, That the paper read by the President of this Association on yesterday be referred to the Committee on Judicial Administration and Legal Reform, with the recommendation that it prepare and submit to the next Legislature such an amendment to the recording laws of this State in relation to the recording of title papers, judgments and executions effecting land titles, as in its judgment may seem proper.

TRIAL BY JURY.

The following resolutions were presented by M. G. Sperry, and on motion referred to the Committee on Judicial Administration and Legal Reform: Be it

Resolved, 1. That it is the sense of this Association that the time-tested right of trial by jury should be preserved.

2. That the intelligent citizenship of our State can be safely relied upon to furnish impartial arbiters of all legal questions of right as between the citizens thereof and between the citizens of this and other States.

3. That the jurors who serve in the State courts are, in our opinion, as intelligent, impartial and unbiased as those who serve in the Federal courts within our State, and that the local prejudice that furnished the basis of the acts of the Congress of the United States giving to citizens of other States the right to remove certain cases from the State courts to the Federal courts, no longer exists, and that the courts of our State can be relied upon to do exact justice to all.

4. That we recommend the repeal of all federal legislation that gives to non-residents the right to remove actions and suits between themselves and citizens of this State from the State courts to the Federal courts.

SEPARATE JUDICIAL CONVENTIONS.

The following offered by Mr. Russell was adopted:

Resolved, That this Association recommend to the Legislature of the State to provide by proper legislation for the holding of nominating conventions for all judicial officers at times different from those fixed for the nomination of any other State or County officers.

Resolved, That the members of this Association use all proper

means in their power to procure the adoption of the legislation hereinbefore indicated.

THANKS TO MR. WATSON.

Resolved, That the thanks of this Association be tendered to David T. Watson, Esq., of Pittsburg, Pa., for the very able, instructive and scholarly address delivered by him before this Association on last evening, and that the Secretary be instructed to send to Mr. Watson a copy of this resolution. Adopted.



Young Marx, a Brooklyn lawyer, had a country place down in Virginia, whereat he was taking a rest. Some one started the report that he had insulted a young lady. Thereupon several young scions of the best families gathered at his house at night to lynch him, or to administer some kind of dire punishment without the foolish preliminaries of having him indicted and tried by a jury of his Virginia countrymen. Marx had read in some old, musty law book that a man's house is his castle, and that a man has a right to defend his habitation against any one who assails him in it, with the intent to kill him or to do him serious bodily harm. Marx therefore got his gun, determined not to be lynched, and stood on his rights, with the result that three young Virginians were killed, and that Marx was vindicated by a Virginia grand jury.



The late Judge Thompson, of Gloucester, Massachusetts, stammered badly. It chanced one day while on his way to attend Court in Salem, that the Judge had for a seat-mate a stranger. Entering into conversation, the Judge who was a genial man, beguiled the time by telling stories. Not many days later when called to Salem again he met the same companion who invited him to sit beside him, saying, "You are the gentleman who told such delightful stuttering stories."



Colonel Webster, the father of Daniel Webster, was a farmer, and his son's spare hours were spent in work upon the farm. Daniel's teacher remonstrated with him for coming to school with his hands in such a filthy condition, telling him if this continued he would be punished. The next day there was no improvement, and when summoned for punishment he was told that, if he could find one other hand in the whole school that looked as badly, he would be let go. "I can," was the quick response, as he held out his other one.

The Judicial Amendment.

(The following article from the pen of an eminent member of the bar takes the same position substantially as Judge Reynolds, but is more specific on some points and will be read with interest by the profession:)

To THE BAR:

The judicial amendment to the constitution submitted by the last Legislature to the vote of the people at the coming November election is misunderstood.

By reference to the joint resolution proposing this amendment (acts 1901, page 462), it will be seen that it does not purport to amend and re-adopt the whole of article 8 of the constitution or any particular section of it, and that the act of the Legislature stating it to be an amendment and re-enactment of section 2 of article 8 is a mere misrecital. Of course the language of the joint resolution determines what the amendment really is. Article 8 will continue as it is now written in the constitution, but subject to such changes of any of its provisions as will be affected by the proposed amendment.

It seems to be erroneously supposed that when the constitution is in any form amended, the whole article or section must be redrafted and adopted in the amended form. That would be a very disastrous rule and a costly process of amendment. An amendment might be designed to amend different provisions in different sections and in different articles, and that process of amendment would be entirely legal. Are all these sections and articles to be re-written and re-adopted? Surely not. By article 6, section 30, no act of the Legislature can be revived or amended by its title only, and from the habit of re-enacting whole sections of chapters in the code or other acts, which is pursued in the Legislature to conform to said section 30, the idea seems to have been imbibed that there can be no amendment of an act or the constitution except by this tedious, costly process. In the first place that provision applies only to statutes, and to them only to prohibit their amendment by reference to their titles, but it has no reference to amendments of the constitution. A statute can be, many statutes are, amended without mention of any other statute, which statutes yet, by implication, amend the antecedent law. This mode of amendment without saying what statutes are amended or changed, by implication, seems to have been forgotten, much as it always has been, is, and must continue to be used. There are fifteen amendments

tacked on to the Federal constitution. They do not mention or re-draft and re-adopt any antecedent article or section. The antecedent articles and sections still stand, but they are changed so far, and only so far, as the amendments do, by implication or construction, amend them. This is the process adopted in the proposed judicial amendment. Is not a process adopted in the amendment of the national constitution, and used for so many years, good enough? The State constitution, article 14, section 2, gives the Legislature power to propose amendments to it, but it lays down no form, no formula, no particular process of amendment that requires a redraft and re-adoption of any article or section. When an amendment is adopted it changes the constitution in those provisions inconsistent with the amendment, and changes it only so far. Thus, this amendment would necessarily change the constitution as it now is as regards the number of judges of the Supreme Court by constituting it of five members instead of four, operating to that extent to amend article 8, section 1. Why? Because the amendment says the court shall consist of five judges, while that section says it shall consist of four. They are inconsistent as to that matter. The amendment will change section 16, article 8, as to the salaries of Supreme and Circuit Court judges, because that section now fixes the salaries at \$2,200 and \$1,800 respectively, whereas the amendment says salaries of judges shall be fixed by law. The amendment does not make any change as to mileage, and the constitution as it is will therefore stand as to mileage. The term of office of judges is not touched by the amendment, but is governed by section 1, article 8. Every provision of the constitution as to the Supreme Court and the Circuit Courts and their jurisdiction is left intact, save as the amendment by legal construction shall change it, just as all provisions of the Federal constitution stand intact except so far as its amendments so change them. The process adopted in the present instance is the cheapest and best where the design is to make change in only a few aspects.

Again, it is said that the amendment does not change salaries of the judges. That is a matter for the Legislature if the amendment shall be adopted. But the amendment does allow change by the Legislature. If no change was designed, why does the amendment treat of salaries? The very fact that it deals with salaries shows that power to change was intended. It says that the judges "shall receive

such salaries as shall be fixed by law." The word "shall" is the future tense, and refers to future legislation. It cannot mean as "is now fixed by law." Is not power to change salaries manifestly intended? If not, why does the amendment deal with that subject? It says that salaries shall be fixed "by law." Salaries are now fixed by the constitution, and the code provision as to them merely follows the constitution, but under the amendment mere "law" will answer, and of course an act of the Legislature is a "law." True, the constitution is law, but when it authorizes a thing to be done "by law," it means action by the Legislature; indeed, it means only by legislation. Instances are found scattered throughout the whole constitution of this power to do things by "law," and who can deny that it is meant that the Legislature has full power, from time to time, to enact legislation touching the subject to which the language relates. What other interpretation was ever given to such provisions? Article 3, section 9; article 4, section 6; article 6, section 10; article 6, section 11; article 6, section 27; article 6, sections 46, 47, 48; article 7, section 11; article 8, sections 3, 8, 11, 18, 19, 24 and 28, so provide, and many other sections might be added to the list to show that the provision of the proposed amendment that salaries shall be prescribed by law is no unusual provision and has a very plain meaning.

When a new provision is made by either a constitution or statute, in getting at its meaning we first seek to know the evil intended to be remedied, the change intended, and we so construe it as to get rid of the evil and accomplish the remedy or change desired. Now, in this instance the evils to be remedied were the lack of a sufficient number of Supreme Court judges, and the unalterable sum fixed by the constitution for judicial salaries, entirely taking away from the Legislature, where it ought to be, the power to fix salaries as time might demand, and the change desired was the increase of the membership of the Supreme Court by one judge, so as to better enable it to perform its large work, and avoid equal division often occurring from the even number of its judges and to give to the Legislature power to fix salaries and change them as time might demand. The Federal constitution and State constitutions generally leave the compensation of judges to the Legislatures. Who cannot, with any show of reason, say that it is not the plain design of this amendment to leave the salaries of judges to be fixed by the Legislature?

Liability of Sureties on Bonds of Ministerial Officers.**TO THE BAR:**

A somewhat peculiar and interesting case was appealed from the Circuit Court of Summers County lately, and but for the fact that it was settled pending a hearing in the Supreme Court, might have made interesting reading to the members of the profession. I refer to the case of "City of Hinton for etc., vs. V. Karnes et al.," appearing on the docket of the court for its January term, 1902. It grew out of the following circumstances: Karnes was a policeman of the City of Hinton, and as such had given bond to the city, the condition of which bond was that the said policeman should *faithfully discharge the duties of his office*, and account for all money coming into his hands, etc. While acting as such policeman on his beat in said city in the regular uniform of an officer and while attempting to arrest one Vanstavern for an alleged breach of the peace committed in the presence of the officer (a mere misdemeanor), Karnes fatally shot Vanstavern, and for which homicide he was afterwards tried, found guilty of murder in the second degree and sentenced to the penitentiary. The administrator of Vanstavern, through the city, then instituted an action on the said bond against the said policeman and the sureties on his bond, alleging the unlawful killing under the above circumstances as a breach of the condition of the bond; that the shooting was an act of the policeman done by virtue of his office as such, and also alleging the act as done under color of the office, and also setting up the fact of the conviction of defendant Karnes as above detailed. Defendant demurred to the declaration, and the court, holding that the killing was an unlawful act of the policeman, beyond the authority given him by virtue of his office, sustained the demurrer and dismissed the plaintiff's declaration. A writ of error was then secured, but the case was settled pending a hearing as above stated.

What is the liability of sureties on the bonds of ministerial officers under such circumstances? It is unquestionably true that if such acts of the officer were done *virtute officii* the officer, along with the sureties on his official bond, would be liable for all consequent damages to the extent of the bond, but how about the act if done only *colore officii*?

Now, the policeman in this case told Vanstavern that he was a policeman and held himself out as such; was in the regular police uniform, and acting as such officer.

The doctrine as stated by Mr. Hogg in his valuable work on Pleadings and Forms, is that, as a general rule, a sheriff is liable in a civil action for all injurious acts done *colore officii*, as well as for all such acts done *virtute officii*, when such acts are unauthorized and damages flow therefrom, and says: "It seems that where an executive officer has given bond for the faithful performance of his duties, and he exceeds the bounds of his lawful authority, or uses more force than is necessary to make an arrest, he and his bondsmen are liable, or after the arrest the prisoner is injured through the acts, or by reason of his neglect, the sureties on the bond are liable."

In the case of *Clancey vs. Kenworth*, 74 Iowa, 740, the court held the bondsmen liable for damages for the malicious and unlawful beating of a prisoner by a constable in making an arrest in the discharge of the functions of his office, the conditions of the bond being for the faithful discharge of the duties of his office.

The court in 91 Iowa 564, held that an arrest by a deputy sheriff, being in the line of his official duty, though illegal, because in excess of the duty, was nevertheless a breach of the conditions of his bond. See also 91 Wis. 201; 120 N. C. 60; 11 Md.-App. 392; 55 Ark. 502; 137 Mass. 191; 17 Gratt. 131; *Knowlton vs. Bartlett*, 1 Pick 273. All these cases support, more or less directly, the contentions of the plaintiff that the sureties were liable. The leading later case, which we remember to have seen quoted in *THE BAR* recently is the case of *Brown vs. Weaver*, 76 Miss. 7 (reported in 23d So. Rep. 390), in which case it was held that a sheriff and his bondsmen were liable for the act of his deputy in wrongfully shooting a misdemeanor fleeing to escape after arrest, as having been done *virtute officii*, the shooting being an official act. This case goes further than any found by the writer in holding the sureties liable, but is a well-written and well-reasoned case. The authorities are clear that if the act resulting in injury is an official act the officer and his sureties are liable. And it is equally true that if it is not an official act they are not liable. An official act, however, is not only such an act as the officer may lawfully do in the conduct of his office. If this were true, no action could ever be maintained on his bond for his misconduct in office, for so long as

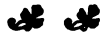
he acted lawfully no person could be damaged, or if so, it would be "*damnum absque injuria*." It means, therefore, whatever is done under color or by virtue of the office. As is said in Murphy on Sheriffs, Sec. 60.

"To hold the deputy and his sureties liable on his bond it is not necessary that he should be acting under some writ, but if he is acting under color of his office, and professes to so act, and induces others interested to believe he acted *colore officii*, he and his sureties will be bound by such acts. No other rule would be safe. Sureties are not needed on a sheriff's bond if they are only to be held when the acts are legal. They vouch for his acts and bind themselves to make good any damages he may cause to any one while acting under the color of his office."

So it would seem that the unwary surety runneth risks he "wots not of," and accentuates the growing necessity of surety company bonds for all executive officers.

T. N. READ.

Hinton, W. Va., February, 1902.



The method of maintaining discipline in the State Prison at Folsom, Cal., is declared to be very successful. There are no dungeons or dark cells, and none of the old modes of punishment are recognized in this institution.

When a new prisoner is received he is informed that they have three different bills of fare in the prison, and that it is optional with each man as to how well he lives. If he is industrious, orderly, well behaved, and in all things conforms strictly to the rules of the prison, he is served with excellent food, nicely cooked. He can have chops, steaks, eggs, tea and coffee, milk and white bread; and if he is only fairly well behaved, and does not do his allotted task properly, is inclined to growl and grumble at the regulations of the institution, he is given ordinary prison fare—mush and molasses, soup and corn bread; and if he is ugly and insubordinate, he is permitted to feast on unlimited quantities of cold water and rather a small allowance of bread.

There is said to be an intense rivalry among the convicts to enter the first class, and once there, it is very seldom that one of them has to be sent back to a lower class.

Royalty Royally Received.

WHEN the American people go into the entertaining business they don't allow any small matters to stand in the way of a clean job. The whole country seems to be organized into a committee of the whole to show Prince Henry how we can do it. The thoroughness of the organization has inspired the poet to put in measured lines the details of the program thus:

THE COMMITTEE:

Travel-stained and dusty
Is the Prince, behold !
We will take and bathe him
In a tub of gold.

RUB COMMITTEE:

And with softest towels
Of the finest silk,
We'll dry the royal body
White and sweet as milk.

SCRUB COMMITTEE:

We will go before him
To scrub the pave of stone
Until it shines like jasper
Leading to the throne.

CLUB COMMITTEE:

We will open every club
To let his Highness see
What really is American
Hospitality.

SNUB COMMITTEE:

We will watch the inside few
Who think they have a right
To be the Prince's bosom friends,
And snub them out of sight.

GRUB COMMITTEE:

We will feast him to the full
On solid things and toda.
The Prince shall have the nectar and
Ambrosia of the gods.

PUB COMMITTEE:

We will do our level best,
From center clear to brim,
To show his Royal Highness what
The public thinks of him.

FLUEDUD COMMITTEE:

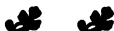
We will bring before the Prince
All manner of delights
In celebration, that will fill
All of his days and nights.

Grand Chorus:

All is well, all is well;
Let us rise and sing
An anthem of praise
To this son of a King.



A curious case has been tried in Chicago. In a murder case the widow of the victim was testifying concerning the statement of her husband when he was dying. According to her, he expressed his views in a slang phrase. When the accused was brought to the deathbed, the widow testified that she asked her husband if he knew him, and he answered, "You bet your life he is the man." The defendant set up that the victim could not have believed himself dying or he never would have used the slang phrase, and that therefore the testimony lost the seriousness that always attaches to a dying declaration. The judge held that a man on his deathbed might use such a phrase. "It would depend altogether on his previous environments, habits and education."



A justice of the peace in Mississippi has decided that a negro's head is a deadly weapon, the negro being what was known as a "butter," and went by the classic name of "Buttin' Jim." His habit was to butt vigorously with his head like a ram. He attempted to butt once too often and got killed for his pains, and the sapient justice of the peace discharged the prisoner committing the homicide, on the ground that he did the act in defending himself against an assault with a deadly weapon.



There is likely to be an interesting discussion in the United States Senate over the power of that body to suspend a Senator. The question will come up as an abstract proposition under the resolution offered by Senator Platt of Connecticut.

The Amendments.

EDITOR BAR:

We notice in the January number of your valuable law journal an article upon the subject of the proposed amendments to our State constitution, to be voted upon at our next general election. And as we know of no better medium of reaching the voters of the State than through the members of the West Virginia bar, we respectfully submit for their consideration the following, to-wit:

As we are informed there are five amendments to our State constitution to be voted upon. 1. Secretary of State amendment. 2. State officers' amendment. 3. Judicial amendment. 4. Irreducible school fund amendment, and 5. Registration amendment.

Amendment 1 provides that the Secretary of State shall be chosen by the people. This amendment we favor. Amendment 2 provides that salaries of State officers shall be fixed by statute. We also favor this amendment. The fixing of salaries has no place in the State constitution, but should be fixed by statute. Amendment 3 provides that our Supreme Court shall consist of five judges instead of four. We are opposed to this amendment. Instead thereof we favor "an amendment to the amendment," and to the statute law, providing for separate judicial conventions, decreasing the number of judges to *three*, and raising their salaries to five thousand (5,000) dollars per annum, instead of two thousand two hundred (2,200) dollars, their present salary. By so doing we will divorce our Supreme Court judges from politics, prevent a tie, and secure our ablest men for the bench. Amendment 4 provides as follows: "The accumulation of the school fund provided for in section 4 of article 12 of the constitution of this State, shall cease upon the adoption of this amendment, and all money to the credit of said fund over one million of dollars, together with the interest on said fund, shall be used for the support of the free schools of this State. All money and taxes heretofore payable into the treasury under the provisions of said section 4, to the credit of the school fund shall be hereafter paid into the treasury to the credit of

the general school fund for the support of the free schools of the State.

Amendment 4, like the judicial amendment, should fail at the ballot box next fall. This school fund has been years in accumulating, growing larger and larger each year. It should not, however, be squandered under the free school system now in vogue in our State. We are not yet prepared to place this fund where we will obtain the best results. Our public school system needs to be materially changed. It needs remodelling. It needs to be removed from the zone of politics. We want the centralization of our rural schools—the system already introduced in several States; fewer school buildings and better and fewer teachers; a graduating system in our public schools, so that graduates therefrom may enter the Normal schools and the State University without examination, from one to the other respectively; when this is accomplished then we shall favor amendment 4, but not until *then*.

Amendment 5—registration—should carry.

To recapitulate: We favor amendments 1, 2 and 5, and are opposed to amendments 3 and 4. If we are wrong in our conclusions we have to say to those against us, "Lay on McDuff."

Winfield, W. Va., Jan. 11, 1902.



A New York judge answered the solemn allegations of a defendant as to the charge of a fraudulent conveyance in this complete and caustic fashion:

"Another reason assigned in the answer why no fraud could have been intended is, that 'William Seward lived a life of exemplary observance of the precepts of religion of which he was, in the vigor of his days, a preacher,' and left behind him a good character. What religion in particular he promulgated does not appear, nor am I concerned to know. Whatever may have been its form it cannot be a good plea in bar to a bill in equity. If his children truly reverence his memory they would do better to satisfy this debt of three thousand dollars which he left behind him than they do by holding on upon the twelve or fifteen thousand dollars' worth of property which they received from his bounty, and attempting to shield themselves behind his religion."

Absurd Mistakes in Statutes.

According to the *Law Times* (London), Mr. Jennings thus writes:

A good instance was cited by Lord Stanhope in the House of Lords in 1816. A statute enacted the punishment of fourteen years' transportation for a particular offense, and upon conviction *one half thereof* should go to the king and one half to the informer. Mr. Sergeant Robinson, in his *Reminiscences of Bench and Bar*, alludes to the celebrated instance of the statute for the rebuilding of Chelmsford gaol. An early clause prescribed that prisoners should be confined in the old gaol until the new one was built, but at the last moment a section was added to the effect that the new prison should be constructed out of materials of the old one, and so the bill passed for the time without the detection of the glaring inconsistency.

The *American Lawyer* says that the Kentucky legislature evidently does not believe in the "didn't know it was loaded" excuse, as it passed an act some time ago which read as follows: "It shall be unlawful for any person to fire or discharge at random any deadly weapon, whether said weapon is loaded or unloaded."

In the old days the legislature of the Territory of Nebraska passed an act reading somewhat as follows: "Whoever shall allow any stallion, jack, bull, boar or ram, to run at large, shall be fined not exceeding ten dollars, and shall be taken up and castrated."

An act is said to have been introduced into the Nebraska legislature forbidding:

The firing of any pistol, revolver, shot-gun, rifle, or any firearms whatsoever, on any public road or highway, or within sixty yards of such public road or highway, except to destroy some wild, ferocious or dangerous beast, *or an officer in the discharge of his duty.*



Pat—What caused the big explosion?

Mike—Riley wuz carryin' a case av dynamite when the whistle blew.

WEST VIRGINIA COURT OF APPEALS.

Decisions Handed Down at the Last
Term.

REPORTED SPECIALLY FOR THE READERS OF THE BAR.

Appearing Here For the First Time in
Print.

Michael Naughton vs E. J. Taylor et al.

Dent, J.

From Ritchie County.

Affirmed.

Syllabus.

1. When the evidence is conflicting unless the Circuit Court's conclusion is plainly wrong, the decree appealed from will be affirmed.

W. S. Stuart, Admr., &c., vs Annie M. Neely, Admr., &c.
Nannie M. Neely and Thomas E. Davis and Jacob Martin, Executors,
Appellants.

Dent, J.

From Doddridge County.

Reversed in part and affirmed in part. Remanded.

Syllabus

1. Where a father in the extremity of death conveys a portion of his property to an adult daughter in consideration of services justly rendered him, such conveyance will not be set aside at the instance of creditors who might have availed themselves thereof as made for their benefit had they applied in time unless it is shown that the consideration therefor is inadequate or voluntary, or that it was made with intent to delay, hinder and defraud the grantor's creditors.

2. If after marriage a husband become an habitual drunkard his wife is justified in leaving and living separate and apart from him, and will not be thereby barred of her dower in his estate. She need not wait until she loses her health, her limbs or her life.

O. S. Willson et al., Appellees,
 vs
 J. S. Carrico et al., J. F. Carrico et al., Appellants.
 Dent, J.
 From Tucker County.
 Reversed.
 Syllabus.

1. When a bill in a creditor's suit is referred to a commissioner to ascertain the liens and their priorities against the debtor's property any creditor having a claim against the debtor has the right to present such claim, and if allowed by the commissioner, has the right to have the same passed on by the court without formal pleadings, and if the court rejects the same such creditor may appeal to this court.
2. A surety in a suit pending for the purpose is entitled to have the principal's property applied on the indebtedness for his relief.
3. If an insolvent debtor convey property to a purchaser for value in a position to know that such debtor is making such conveyance to delay, hinder and defraud his creditors, such conveyance will be avoided at the instance of such creditors.
4. The attacking and preferred creditors are entitled to have their indebtedness paid in full out of property transferred in unlawful preference under Section 2, Chapter 74, Code, as against creditors who fail to unite in and agree to contribute to the costs and expenses of the suit instituted to avoid such preference.
5. The preferred creditors who attempt to sustain the preference given them are entitled to the full extent of their indebtedness, to share *pro rata* in the distribution of the property unlawfully transferred with the attacking creditors.

— — —
 Erb vs The Hendricks Company, Limited.
 McWhorter, J.
 From Tucker County.
 Reversed and dismissed.
 Syllabus.

1. H. Co. recovered a judgment before a justice in R. County against H. & E. and had the same certified to the clerk of the Circuit Court of said county under Section 118, Chapter 50, Code. The clerk of said court issued writ of execution thereon directed to sheriff of T. County, who levied the same on property, claimed by J. B. E., the sheriff demanded and received from H. Co. an indemnifying bond. J. B. E. filed his petition under Section 152, Chapter 50, before a justice of T. County, who notified the execution creditor and defendants to try the right of the property levied on before said justice. Held: The execution having been issued from the clerk's office of a Circuit Court, the justice was without jurisdiction in the premises.
2. In such case the remedy of J. B. E. was to proceed in the Circuit Court of T. County under the provisions of Chapter 107, Code, or upon the indemnifying bond taken by the sheriff of T. County.

Lee vs Patton.
McWhorter, J.
From Ritchie County.
Affirmed.
Syllabus.

1. Where the decree appealed from is right the same will not be reversed because the Circuit Court was incorrect in its reasons for its conclusion.

2. Under Section 23, Chapter 130, Code, a donee is incompetent as a witness to prove the delivery to himself of a gift by the donor, the latter being dead when the testimony is offered.

The Parkersburg Mill Co. vs The Ohio River Railroad Co
Dent, J.
From Wood County.
Affirmed.
Syllabus.

A verbal agreement of which there is no note or memorandum in writing signed by the agent or party to be charged thereby and which is not to be fully performed within one year from and including the date of its making, comes within the inhibitions of the statute of frauds and cannot be enforced by action at law.

Uthermohlen vs Bogg's Run Company.
Brannan, P.
From Ohio County.
Judgment affirmed.
Syllabus.

1. A land owner is under no duty to a mere trespasser to keep his premises safe, and the fact that the trespasser is a child does not raise a duty where none otherwise exists. Such a trespasser, injured on such premises, cannot recover damages of the land owner by reason of the unsafe condition of the premises, unless the land owner be guilty of negligence as to amount to wanton injury.

2. One who in the operation of his coal mines upon his own land uses a cable running upon pulleys to haul coal cars from his mine is not liable for injury to a child trespassing on the premises and received from such cable and pulleys.

3. The examination of an infant witness as to his competency must be left necessarily to the discretion of the trial judge, and this discretion will not be reviewed by an appellate court unless the error of the judge be palpable and plain and amount to an abuse of his discretion.

4. There must be a duty resting by law on one person to charge him with damage from the negligence of another. No action for negligence will lie without a legal duty broken.

5. The "Turntable Cases" discussed.

**Wood vs Wood
McWhorter, J
From McDowell County
Reversed and remanded
Syllabus**

1. A bill filed for the purpose of establishing the fact of a partnership between plaintiff and defendant and having same dissolved and the partnership accounts settled, which partnership is denied by the defendant, and the allegations of the bill are sufficiently definite to show an agreed partnership and that the same went into actual operation, and prayer "that the status of the parties, plaintiff and defendant, be ascertained and settled; a partnership decreed as existing between them; the interest of each partner be ascertained and declared; that an account be taken of all matters concerning the partnership, including the assets and liabilities of the concern and the individual accounts of the partners; that a decree be entered for the sale of the partnership, and that the defendant be required to discover the profits and earnings of the co-partnership. Held: Sufficient on demurrer.

2. In such a case, an amended and supplemental bill praying for a receiver having been filed, where the defendant is in possession and conducting a successful and prosperous business, who denies the partnership, and is solvent and able to respond in damages, the court will not appoint a receiver.

3. In a suit to dissolve a partnership and settle its accounts, where the defendant in possession denies the partnership, a receiver should not be appointed unless the fact of partnership is clearly proven in the cause and there is danger of the loss or misappropriation of the property of the firm or a material part thereof.

**Thomas M. Darrah vs Wheeling Ice and Storage Company
McWhorter, J
From Ohio County
Affirmed and action dismissed
Syllabus**

1. Under Section 53, Chapter 53, Code, providing that "The board of directors (of a private corporation), shall appoint such officers and agents of the corporation as they may deem proper, and prescribe their duties and compensation. * * * The officers and agents so appointed shall hold their places during the pleasure of the board." Held: The board of directors cannot appoint such officer or agent so as to bind the corporation to keep him in such position for a definite, fixed period, but he is removable at the pleasure of the board.

2. The officer of a corporation is presumed to know its by-laws adopted before his appointment and is bound by them as to his tenure of office. They have become the law between himself and his employers, and if the board of directors remove such officer under one of such by-laws which provides that he may be removed or discontinued at the pleasure of the board, he cannot complain.

Franklin & Ihrig vs Vandervort, Special Judge.

McWhorter, J.

From Wood County

Prohibition refused

Syllabus

1. Where it is shown by the record that on the day fixed by law for the commencement of a regular term of the Criminal Court of a County, the regular judge thereof being sick and failing to attend and hold said court at the commencement of said term, the clerk of said court proceeded to hold an election for a special judge of said court, as provided by Chapter 112, Section 11, Code of West Virginia, and several attorneys named, being placed in nomination, and the clerk of said Criminal Court having held said election, declares as the result thereof that J. W. V. received a majority of the votes cast by the attorneys present and practicing in said court, and was duly elected judge of said Criminal Court, during the temporary absence of J., the regular judge, thereupon said J. W. V. appeared and took the several oaths prescribed by law. Held: The law has been substantially complied with and the election is valid.

2. Such term of court commenced on the 28th day of January, 1901, the grand jury returned an indictment for a misdemeanor against F. and L., which was tried at same term and a verdict of guilty rendered; on February 9th defendants to set aside the verdict and grant them a new trial; before the motion was passed upon by the court on the 14th day of February, the regular judge died, and on the same day the sitting special judge was duly appointed and qualified to fill the vacancy, and proceeded with the business of the term unbroken, and on the following day the court overruled the motion to set aside the verdict and grant a new trial. Held: The court had jurisdiction and prohibition will not lie to inhibit it from entering judgment on said verdict.

3. The death of the regular judge did not end the regular term of the court then in session, the death of the judge and the qualification of his successor happening on the same day, the court proceeded without intermission—the same term.

Yost vs Graham.

McWhorter, J.

From Marion County,

Affirmed.

Syllabus.

1. A voluntary assignment by a party, according to the law of his domicil, will pass his personal estate, whatever may be its locality, abroad as well as at home.

2. It is not enough that the purpose of the assignor be fraudulent, knowledge of such purpose must be clearly brought home to the assignee.

3. The legal situs of personal property follows the domicil of the owner, and the law of the actual situs protects the claims of creditors domiciled there, only against transfers by operation of law.

Niswander & Co. vs Black.

McWhorter, J.

From Wood County.

Affirmed.

Syllabus.

1. An account purporting to be an itemized account of materials furnished to a principal contractor for building a house, amounting in the aggregate to the sum of \$886.75, filed with the clerk of a county court and served with notice upon the owner under the provisions of Chapter 75, Code, which account contains one item, "Estimate furnished \$485.00," such account and notice are not sufficient under said chapter to entitle the material-man to his lien for said item of \$485.00.

2. When the account is filed with the clerk of the County Court as provided in Section 4 of said Chapter 75, it is not essential and not required by said section that the account and affidavit so filed shall show on its face the fact of service of the account and notice on the owner, such fact may be proved under proper allegations in the bill.

3. Failure of the owner to record his contract with the principal contractor does not render his property liable to the claims of any laborer, mechanic or material-men except such as have so complied with the provisions of the statute as to entitle them to their liens.

4. Where an account has been properly filed and notice thereof given by a laborer, mechanic or material-men and the owner has failed to limit his liability by recording his contract, his property upon which the building is situated becomes liable for the whole of such lien without regard to the amount that was to be paid by the owner to the contractor.

State vs Alderton.

Dent, J.

From Tucker County.

Reversed and judgment for defendant.

Syllabus.

A demurrer to evidence is not a usual or proper practice in a criminal prosecution.

2. The accused may move to exclude the evidence, or in a misdemeanor case by agreement or consent a jury may be waived and the facts submitted to the court for determination.

3. On the trial of a licensee for selling or giving intoxicating liquors to a person in the habit of drinking to intoxication, it devolves upon the State to show beyond a reasonable doubt that such licensee knew or had reason to believe that such person was in the habit of drinking to intoxication.

James Sanderson, Appellee, vs The Panther Lumber Co., Appellant.

Dent, J.

From McDowell County.

Reversed.

Syllabus.

1. A foreman of a lumber camp whose duty in the interest of a common employer requires him to ride on a log train to and from the camp to the mill is a fellow servant with the employees of the same employer operating such log train and not a passenger unless there is an express or implied contract requiring him directly or indirectly to pay fare for his passage.

2. An employee assumes not only the risk of accident occasioned by the negligence of his fellow servants, but also of the known negligence of his employer if he accepts or continues in such service after knowledge of such negligence.

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A LIST of the standing committees for the current year appears on another page. President Price has made good selections, and has done it promptly, so that every committee can have plenty of time to get in its work.



IN the recent article appearing in **THE BAR** on the Irreducible School Fund, by Supt. T. C. Miller, the printer made him use the word *strange* for *strong*, which very materially altered the meaning and spirit of the article.



A GAS company in New York State sought to collect a gas bill from a tenant of property, due from a former tenant of the same property and on refusal to pay the company removed the meter. The tenant sued the company for refusal to furnish him gas, and the jury awarded him damages at the rate of \$5 a day for the inconvenience, amounting in the aggregate to \$4,800. The Court held the verdict good. Gas companies will take notice and govern themselves accordingly.



THOMAS B. REED says of newspapers: "It must be confessed that I know very little about newspapers.

Probably a good man could not know much, unless, indeed, he was a publisher or an editor. That the editors and publishers are good men actuated by the highest motives, I notice incidentally by the newspapers themselves. I do not quarrel with them because they admit it, but I wish they would admit it every day. Which reminds me to say to you that absolute goodness and disinterestedness can be predicated of no profession outside of the law."

An Epidemic of Divorce.

PROBABLY there is no question upon which the public mind throughout the country, is exercising itself more intently, than upon the matter of divorce.

That divorce proceedings are on the increase, there can be no doubt. Our courts are full of them. Men and women are coming to take a new view of the marital relation. There is no settled, or apparently, no preponderating attitude, even in the churches, as to what ought to constitute reason for divorce. Certain it is that no uniform divorce laws could be agreed upon between the states.

In discussing the increased prevalence of divorce in this country, the New York Sun declares that it is not due to licentiousness, for four-fifths of the divorces granted are for causes other than strict infidelity, and the great majority of them are to wives because of neglect or positive ill treatment of them by their husbands.

When marriage in the eyes of the law is a civil contract purely, divorce becomes inevitable and, logically, for many causes, for, unquestionably, wives may suffer more in actual physical hardships from desertion, and from the cruelty, drunkenness and persistent neglect of their husbands to provide for their support than from unfaithfulness to the prime obligation of marriage.

Accordingly, with the exception of South Carolina, New York is the only State in the Union in which adultery is made the sole ground for divorce. If a national divorce law was possible it would be sure therefore to be in the direction of the freer divorce which is favored and demanded so emphatically by the vast preponderance of American sentiment. The only sentiment by which divorce can be prevented is a religious

sentiment which renders voluntary individual obedience to a Church dogma of the indissolubility of matrimony.

We are not sure that either a multiplication or curtailment of the legal grounds for divorce would have much influence in increasing or diminishing it. The controlling influence in such matters is public sentiment. When a man and woman have determined to separate they will defy or circumvent the law, when they would not be brave enough to defy public sentiment. The following illustration comes from a recent case in an Ohio Court:

The wife was plaintiff in the case charging cruelty. The husband filed a cross petition charging infidelity. On the trial an uncle of the defendant testified that he had been intimate with the plaintiff. His testimony was interrupted by the judge with the inquiry: "Do you expect me to believe that you, a friend of the defendant's, invaded the sanctity of his home and that he knows all about it?" "Yes, sir," was the reply. "I don't believe you," said the judge. "No decent man would tell such a story in any court. Get off the stand." The decision in the case was reserved, but the court said: "If I grant a divorce at all, it will go to the woman on the grounds of cruelty, and the most extreme cruelty practiced by the husband was the attempt to besmirch the character of his wife when he could not prove his charges. A man who willfully does this ought to be sent to jail for six months and kept on bread and water."



THE BAR is under obligations for recent favors to circuit clerks, A. G. Mathews of Grantsville, Leroy L. Stidger of Moundsville, and T. C. Whitely of Logan.



"Why do they put the nation's flag on top of the schoolhouse?" asked the teacher who wanted to instill a patriotic lesson.

"Please, ma'am," answered the head boo, "It's because the pole is there."

The Unanimous Verdict.

INDICATIONS are not wanting, says an exchange, that the sentiment in the legal profession throughout the country in favor of reforms in the jury system will bear fruit before long. That the people will not consent to the abrogation of this system which, like everything else human, has its imperfections, seems equally evident; hence it is that some of the brightest minds in the profession and upon the bench are considering the best manner of improving this time-honored method of determining questions of fact in both civil and criminal cases. One of the reforms to which a very large number of leading judges and lawyers seem to be turning, is that which proposes to authorize verdicts by less than a unanimous vote.

Judge Robert Earl, of the New York Court of Appeals, suggests a plan as follows: That where not less than ten jurors agree, the presiding judge shall be permitted in his discretion, if he concur with the ten or eleven jurors, to take their verdict so that there will be in all cases the concurrence of at least eleven minds in the verdict reached. Judge Earl expressed the belief that this would be a safe reform and that it would serve the ends of justice.

In the issue of the *International Monthly* for January, will be found an article by Mr. Justice Brewer, of the United States Supreme Court, in which he also advises the abrogation of the unanimity rule, as well as other changes. As to the unanimity rule, he says:

"Everyone knows that in an important and hard case the struggle of counsel is to secure upon the jury one or more who are friendly to their client, or in sympathy with the cause or interest with which he is identified, or who may be easily influenced by appeals to prejudice or sympathy. The

intelligent business man, the mechanic and the farmer, too, quickly respond to the voice of the judge commanding justice, and hence, if possible, they must be excluded, and the ignorant, easily moved by appeals of counsel, secured. Let the rule of unanimity be abolished and the result determined by the conclusions of two-thirds or three-fourths of the jury, and this struggle after the single helpful juror will largely disappear. And why should it be deemed essential? Neither in legislative halls, among judges, in arbitration proceedings, nor in scarcely any other body called to make a determination, is it the rule. In my judgment, the great objection to the jury system, as it is administered to-day, and the one which more than any other threatens its overthrow, is this rule of unanimity. Were it abolished less time would be wasted in impaneling a jury, and a better class of jurors would ordinarily be selected. More than that, the truth would be more certainly determined. How often, in criminal cases, do ten of twelve jurors yield to the obstinacy of the remaining two, and agree on a verdict for a lower degree of crime than they really believe the defendant to be guilty of! And in actions for the recovery of money how often is the amount of the verdict affected by the obstinacy of a single juror.

"Free the work of the juror from some of the disagreeable annoyances which now too often attend it. He should not be compelled to work more hours than the judge. To shut him up and keep him confined day and night is a crime against society. He is treated too often as an object of suspicion—as though he were probably dishonest, and must be specially shielded from temptation. Why should he be shut up, while the judge is not? A bad man on the bench or in the jury box will surely find ways to be tempted, and few things are more calculated to degrade his office in the sight of the juror, and to bring out all the evil that is in him, than the consciousness that he is an object of suspicion. I have been nearly thirty-seven years on the bench, and take pleasure in recalling

that, so far as it was possible, I always relieved the juror from confinement other than such as I myself submitted to; that I endeavored to make him in the discharge of his duties free from suspicion and annoyance. And I have not the slightest reason to doubt that the course thus pursued resulted not merely to the comfort of the juror, but in a better administration of justice."



English As She is Writ.

WE have before us, from a correspondent in the interior of the state, a sample of his epistolary correspondence which is about the most original piece of literature that has come under our notice.

The party to whom this missive was addressed is the Prosecuting Attorney for his county and the author was evidently after "law." We append a verbatim copy, as follows:

Well i rite you a few lines to see if they is eny law to have eny one a rested for steeling my wife and child bac he had stole her once and she come back and he come in and trying to get her a gan now if they is eny law you rite and let me now at wunce and i Will go be fore the justes and sware out a wornt for him a rested he is here now i don't take much more of uf him

this is from

HENRY E. ALT

let me now at once



THERE ought to be a considerable influx of European nobility to America after Prince Henry reports. He will certainly assure them that there is nothing like the cow boy hospitality, on the face of the earth.

"All About Hell"

THIT is a very warm title to an equally warm topic. It attracted our attention on the title page of a pamphlet bound in a red cover.

The publishers sent it to **THE BAR** with the request that we should review it and send them a marked copy of our comments.

A pamphlet so uniquely constructed and so suggestively entitled could not be consigned to the waste-basket without an involuntary moment of serious contemplation.

The first impression that arises on inspection of such a publication is that "Hell" is a very old topic—one that has been very seriously and solemnly discussed for nineteen hundred years—one that has been the theme of many thunderous and hair-raising pulpit fulminations—one that has disturbed the peace and tortured the conscience of the evil-doer through many a restless night when the imagination was in a pictorial mood—and one, too, that still makes the motive and the consideration in thousands of lives between good living and bad living.

Could there be anything new said about so old a subject is the first inquiry? Or did the author suppose that the legal fraternity is lacking in information along this line and need a kindly warning of their impending danger? Or has some chance explorer obtained some new and startling facts relating to that undiscovered country that he is eager to give the world? Or, rather, we were about to conclude, is this not some new-fangled notion of some cranky theologian who has a new "fad" about Hell that he cannot suppress and is bound to have a new plank inserted in the modern church creeds?

But when we discovered that this red-backed, terribly titled, steaming publication bore the imprint of an

established, dignified and recognized authority on such matters, we began to take it seriously.

It, indeed, proposes to give us the nineteenth Century, orthodox view of that burning question of HELL!

Here is the offer in their own terms!

"HELL" IN A NEW LIGHT.

The "Bible & Tract Society," of Allegheny City, Pa., has issued a remarkable pamphlet, which while thoroughly loyal to the Bible, so explains the references to hell as to make them reasonable, understandable and consistent with the divine character.

The Society offers these free to our readers, as sample copies of its publications "for the promotion of Christian knowledge." Send a postal card request for it. It examines every text and is worth its weight in gold. It undoubtedly will bring a blessing to many a bewildered Christian, and convert many a doubter and sceptic. Nor should we wonder that, when light is breaking upon every other science, the Bible should also become a new book and doubly precious.

We are rather inclined to concur with the publishers that this would be a useful volume in the libraries of the legal fraternity, as it costs only a postal-card we are disposed to commend it not only to those who are collecting libraries, but to those who have space remaining for a small volume.



This tale was told by Judge Pennypacker, in beginning a response to a toast at a Pennsylvania-German banquet in Philadelphia. The story he said, showed the readiness of the Pennsylvania Dutchman to obey those in authority:

In 1864 Sheridan, under orders, burned every barn from a valley above Staunton to a certain point below Winchester. A band of angry rebels followed this raid, watching for a chance to pick up any stragglers. Among others who fell into their hands was a little Pennsylvania Dutchman, who quietly turned to his captors and inquired:

"Vat you fellows going to do mit me?"

The reply came short and sharp.

"Hang you."

"Vell, he said, meekly, "vatever is de rule."

His good-natured reply threw the Confederates into a roar of laughter and saved his life.

Ruling Passion Strong in Death.

A MAN must be possessed of a very deep and devilish personal enmity who will deliberately sit down and vent his hate in the form of a last will and testament.

But some men have been and continue to be too cowardly to give utterance to their prejudice and spite in life and health, and take the opportunity to commit it to paper that will not see the light until they are dead and then takes the form of a permanent libel as a public record.

It is a nice question whether a dastardly injury to one's reputation like that would give the party a right of action against the estate of the decedent. A probate court of Pennsylvania, says an exchange, has recently been called upon to determine this novel question (In re Gallagher, 49 Pitts. L. J., 161.) The petitioner against the estate claimed damages for a libel upon him in the testator's will, the publication of the libel being by probate of the will. The court, after determining that the maxium—*actio personalis moritur cum persona*—has no literal application, is led to allow the action by a consideration of the great injury that the petitioner (an attorney) will suffer in his professional character by an imputation thus perpetuated in a public record. One's sympathy is strongly roused in behalf of the libel claimant. Nevertheless, it is impossible on any established theory of the law to support the decision, desirable as it is in its result.

"If the libel had been published by the testator to the witnesses, for example, a cause of action would have arisen against him. But at common law this would have abated at his death (Walters v Nettleton, 5 Cush., Mass., 544.) And the statutory modifications of the old rule of abatement do not, except in a very few States, apply to the action of libel. (See 21 Cyc. Pl. & Pr., 349.) But the publication complained of is

by probate, so that no cause of action ever existed against the testator. Even if by a fictitious relation of time, such as a devisee may invoke in bringing suits after re-entry, the publication be carried back to his lifetime, the objections of abatement still apply. To support the action, therefore, necessitates the conception of the deceased's estate as a legal entity, itself capable of committing a tort. Were such a conception justifiable the analogy of a corporation's responsibility for libel would permit the estate to be held (*Whitfield v South Eastern R'y E., B. & E.*, 113.) In the Roman law, it is true, the deceased's estate was considered a juristic person, though, perhaps, only as regards rights of property (*Windschield, Pand.*, sec. 531.) But such personification is completely foreign to the common law theory which deals with the estate through administrators and executors, and not as an artificial person. Unfortunate as the result may be, we are driven to the conclusion that the common law is powerless to recompense one damaged by testamentary libel. Its only weapon against this ingenious and infamous method of doing injury rests in the Probate Court's power to strike out the libelous matter, a power which courts seem reluctant to exercise.



Not long ago Judge Dickey, of the Supreme Court, who hails from Newburgh, was holding court in Brooklyn, says the *New York Times*. The lawyer for the defendant in the case before him occupied the time of the court by asking practically the same question over and over again. Judge Dickey called his attention to this fact once or twice, and finally became provoked and said to the lawyer:

"You have gone over that ground time and time again, counselor. Your questions suggest 'crabs' to me—they always go sideways and do not get ahead—and I do not like crabs."

The lawyer pleasantly replied:

"Well I am sorry that your honor does not like crabs; and I most respectfully differ with you in that respect, as well as others. For my part, I like crabs, but I do not like lobsters, especially lobsters a la Newburgh!"

A Justice's Own of a Plea.

To THE BAR:

HAVING noticed in several issues of the Bar examples of pleadings and papers prepared by justices in the different counties of West Virginia, I thought it might be interesting to the readers thereof to peruse a sample from a Tyler county justice's pen which was sent to a prominent attorney of the Tyler county bar, with the request that he examine the same and report to the justice if it was sufficient to file in the damage suit for slander it attempted to set out. Here it is as written by the justice, omitting names.

"Plea against D—S—for misdemeanors done by him against L—W—in the year 1887 and made up to the present which is as follows first which I Bought said land from him he deceived me in falsehoods he told me Emphatically that there was an outlet from the land I purchased of him when at the time there was not any which has been the cause of me loosing considerable loss of time and money. And every effort I have made to get the money he the said S—did confute me and it caused me on my part a failure therefore I failed to get the money to meet the payment then due and as fast as the payments became due he sued me. When I bought the land of him he did agree with me that if I failed to meet the payments that he would not sue me until the last note become due of which will become due in the year 1892, and all of these promises and agreements on the part of the said S—is falsehoods. And he the said S—has told different persons that I did swear d—n and G—d d—n lies to get my pension and therefore I can produce to any court that said S—did Emphatically make use of the above mentioned Language therefore I claim a damage in this suit for my character the amount of ten thousand Dollars. L—W

As a further explanation of the foregoing paper, it may be proper to say that the suit in which it was to be filed was to be brought in the Circuit Court of Tyler county.

Yours truly,

C. B. RIGGLE.

Preliminary Hearing on Criminal Charges.

MR. Jerome, the new District Attorney of New York. is receiving the commendation of the press of that city for his policy in dealing with persons arrested on criminal accusations:

It has been the practice in New York, as it is in most States, that when a crime has been committed, somebody, must be found upon whom some suspicion rests, be it much or never so little, and the unfortunate is summarily seized and incarcerated until a grand jury can hold an *ex parte* inquisition and possibly find some evidence or show of reason for compelling him to go through the protracted and expensive ordeal of a trial before a petit jury and very often have his character besmiched and his business ruined to escape from a charge that was unfounded and unjust.

The new policy of the District Attorney, and one which other States might well emulate, is to investigate charges against persons under suspicion of crime, before indictment, instead of after; to endeavor to learn who committed a particular crime, rather than, finding that a crime has been committed, and being content to have a victim who is accused of it, no matter how insufficient the evidence.

The new policy in New York found a striking commendation in the recent case of Florence Burns, a beautiful and accomplished young lady, who was arrested on suspicion of having murdered her lover. Her case aroused the sympathy the whole city. The District Attorney, instead of leaving her to languish in jail until a grand jury could investigate it, gave the case a thorough investigation on preliminary hearing before a Magistrate, who promptly discharged her, owing to the insufficiency of the evidence.

Had such evidence been presented to the Grand Jury, with

the statements of the witnesses unattacked by the cross-examination, an indictment would probably have been returned. But under cross-examination the testimony had been clearly shown to be legally insufficient to justify the holding of the accused.

If it were insufficient to justify the committing Magistrate to hold the accused, it must be presumed that it would have been insufficient to secure a conviction on trial. In that event, the only purpose the trial would serve would be to involve the county in a great and needless expense. A preliminary examination can never weaken unassailable evidence. If it demolishes worthless evidence it serves a most salutary purpose. It throws an additional safe-guard around the Constitutional rights of all the citizens, it enables the District Attorney to be the prosecuting officer for all the people, rather than the prosecutor of the individual and it saves the people's money.



Ex-Governor Leslie M. Shaw of Iowa the new Secretary of the Treasury, practiced law for many years in the Iowa courts. The Secretary is a good story-teller and narrates this personal experience of the days when he was practicing at the bar.

A boy about fourteen had been put on the stand, and the opposing counsel was examining him. After the usual preliminary questions as to the witness's age, residence and the like, he then proceeded:

"Have you any occupation?"

"No."

"Don't you do any work of any kind?"

"No."

"Just loaf around home?"

"That's about all."

"What does your father do?"

"Nothin' much."

"Doesn't he do anything to support the family?"

"He does odd jobs once in a while when he can get them."

"As a matter of fact, isn't your father a pretty worthless fellow, a deadbeat and a loafer?"

"I don't know, sir; you'd better ask him. He's sitting over there on the jury."

Is a Type-Written Will Valid?

TO THE BAR:

WHEELING, W. Va. March 19 1902.

THE February number of the Bar contained a communication from "X Y. Z" on the subject of whether a will can be typewritten in West Virginia, inasmuch as the statute provides that "no will shall be valid unless it be in writing and signed," etc. Although an answer was invited, I do not notice that any was given in the March number of the Bar.

The question was mooted here in Ohio County a year or two ago when a typewritten will was offered for probate, but the attorney who suggested a contest dropped the subject when attention was called to the statute giving rules to be "observed in the construction of statutes," as follows: Code, Chapter 14, Section 17, clause 8, "The words 'writing,' include any representation of words, letters or figures, whether by printing, engraving, writing or otherwise."

It seems to the writer that in view of this provision of the statute it is clear that a will will not be rendered invalid because of its being typewritten.

Very Truly Yours,

E.



"So you are on an automobile trip?" said the friend. "Where are you going now?"

"I couldn't say for certain," answered Mrs. Cayenne, "whether it is home or the emergency hospital."—Washington Star.



Hotlick: "Your dog bit me last night in the leg, and I want to know what you are going to do about it."

"Lambley: "O, I sha'n't do anything unless the dog should come down with some disease. In that case, of course, I shall hold you responsible."—Boston Transcript.

The West Virginia Debt.

[Applications for information about the debt are so frequent that the following extracts from a letter I recently had occasion to write, seem of sufficient public interest to warrant space in THE BAR. J. M. Mason.]

"As Bayard, Phelps and Coppell have died and as the contract, under which certificates are deposited expires before the legislature meets, it is impossible for the New York Committee to ever move. I formed that Committee and furnished whatever they printed, but, proposing to manage the matter myself, I did not associate any one who gave sufficient thought to become conscious of being ignorant as to what steps to take, or to comprehend what is meant by *Delegatus non Delegare*. The difficult and costly part of the work was to assemble the certificates under a contract binding holders to accept such a settlement as honest men, after studying the subject, would advise West Virginia to make. As soon as this part of the work had been accomplished the financial magnates on the Committee were deceived and buncoed by the Wall street promoter whom I had foolishly put in front as their ostensible adviser and who, lacking sense to act straight, attempted to use this business to exploit himself as the toll-gate to Brown Bros. It resulted that I was eliminated from the undertaking, and it was then left without any one who had sufficient information to suggest what should be done. The outcome was that the first time the Committee attempted to move they unwittingly drifted into the crazy Virginia Commission scheme which had been discredibly exploited several years before when our legislature refused to listen to such nonsense. In other words, promoter number two landed the Brown Committee in precisely the same hole that promoter number one had landed the Fahnstock Committee. Thereupon the undertaking was silently boycotted on Wall street and in both States by the grade of men who are trusted for capacity as well as respected for integrity, and it became so laughed at privately that thinking men steered clear of it. Those * * * of us who understand this subject have always opposed any action unless holders had competent leadership and unless the certificates were under a proper contract: viz. a contract to accept bonds for an amount fixed by the cost of the roads &c in West Virginia,

built with Virginia bonds, or fixed by stating the account required by the Wheeling Ordinance. This account to be stated by Committees representing each State and authorized to submit to arbitration or to the Supreme Court any questions about which they disagreed. If the Court decides that West Virginia owes nothing, then the certificates to be cancelled. Holders to accept the cost of the roads &c although the Court finds that West Virginia, technically, owes much more than the cost of the roads. This was baptized "the Baltimore Plan," and I have never heard of any man in this State of dignity and standing, who did not endorse it. * * * * About ninety per cent of the certificates are controlled on Wall street. Probably nine millions are owned by less than three hundred holders. Fifty very rich New York men own six millions. * * * *. A settlement would have been had long ago if holders had dealt directly with West Virginia parties. All the trouble has been created by the machinations of two Wall street promoters who never owned a single certificate and never had a dollar invested. The remedy for the situation is for a self-constituted Committee of West Virginians to advertise in New York requesting certificate owners to communicate their names to a financial institution and receive a pamphlet giving the real situation and explaining how a settlement may be brought about. If the rich holders had a suspicion of the real situation, they would offer a very large fee for intelligent leadership, and would put up any amount required for the expenses, of bringing about sensible co-operation. The West Virginians managing this most important business would creditably earn adequate compensation, while rendering the State the greatest service. Holders would flock to such a Committee and the marplots on Wall street would be ignored.

* *



Tired of the long-winded oratory of the attorney for the defense, the judge interrupted him.

"Mr. Sharke," he said, "may I ask you a question?"

"Certainly, your honor, What is it?"

"Language," said the judge, we are told is given to conceal thought or words to that effect. Inasmuch as you don't seem to have any thought to conceal, I would like to know why you are talking?"



"Bridget, why did you let that policeman kiss you?"

"It's agin th' law to resist an officer, ma'am."

Distinction Between Non-Suit and Judgment on the Merits

The questions of practice arising on a non-suit are somewhat obscure, and the authorities not very satisfactory or harmonious.

In a recent case, *Dealy vs. Heintz*, the New York Court of Appeals rendered a very well considered and elaborate decision, which may serve as a good brief to the practitioner who needs authority on points involved in non-suits. The Court said:

This appeal involves simply a contention concerning the proper name which should be given to the judgment appealed from. The plaintiff avers that on the 21st day of October, 1895, the defendant, residing and doing business at the City of Cologne, in the German Empire, sold and delivered to the plaintiff's assignor 130 casks of carbonate of potash, warranted to contain 80 to 85 per cent of potash. It is then alleged that there was a breach of this warranty on the part of the defendant in that the goods delivered did not contain the requisite percentage of potash. The answer put in issue allegations, and the issues were tried by the court and the complaint dismissed. The judgment entered upon this decision has been unanimously affirmed at the Appellate Division.

The evidence given at the trial consisted largely, if not entirely, of the written correspondence between the seller and buyer, and upon the plaintiff's construction of this correspondence there was some evidence tending to support the claim. It was not a case where it could be said that there was absolutely no evidence to support the claim of a warranty of the goods, but it was of such a character that the court was required to construe correspondence on both sides and to determine the meaning of certain technical terms used in the trade and, generally, the intention of the parties.

The learned counsel for the plaintiff, who brings the appeal now, contends virtually, that he was non-suited at the trial, which means, of course, that the trial court refused to weigh or to consider the testimony, or to determine the facts involved in the issue, but simply

held that there was no evidence whatever to consider. We do not think that this contention is supported by the record. A non-suit is the name of a judgment given against the plaintiff when he is unable to prove a case, or when he refuses or neglects to proceed to the trial of the cause after it has been put at issue without determining such issue. A voluntary non-suit is an abandonment of his cause by the plaintiff, who allows a judgment for costs to be entered against him by absenting himself or failing to answer when called upon to hear the verdict. An involuntary non-suit takes place when the plaintiff, on being called when his case is before the court for trial, neglects to appear, or when he has given no evidence on which a jury could find a verdict (*Pratt vs. Hull*, 13 Johns., 334; *Bouv. Law Dic.*, last ed., vol. 2, p 510, "Non-suit.") The record shows very clearly that no such judgment was entered in this case. It appears that the plaintiff gave all the testimony that she had, consisting of the correspondence between the buyer and the seller, and also some proof in regard to the character and quantity of the goods actually delivered and on the subject of damages, and then rested. The defendant's counsel then moved to dismiss the complaint on the ground that the plaintiff had failed to establish any cause of action; that the theory of the complaint was a claim for damages on account of breach of warranty, and that the plaintiff had failed to establish any such breach by the proof given. This motion was granted and the plaintiff excepted. Subsequently the trial judge made specific findings of fact and conclusions of law, in which he stated that the defendant refused to give any warranty of the character and quality of the goods such as was alleged in the complaint, and, therefore, the plaintiff failed to prove the cause of action alleged. He then stated, as a conclusion of law, that the defendant was entitled to judgment dismissing the complaint upon the merits, and directed judgment accordingly, and stated that the grounds upon which the decision was made are contained in the foregoing findings of fact.

It is very clear, I think, that this was not a judgment of non-suit, but a trial of the issues and a decision of the same upon the merits. The learned counsel, in support of the appeal, contends that, inasmuch as the defendant gave no evidence and made no statement that he rested, the judgment must necessarily be a non-suit. A defendant may rest his case upon the plaintiff's proofs, and when the plaintiff proves a case for the defendant he may take the benefit of such proof without saying anything. It may be, and it was probably, true that the defendant had no proof to give, and it was not necessary to say to the court that he rested when he had not yet begun. It has been held by this court that when a defendant moves for a non-suit, and says nothing more, that it amounts to a submission by him to the court of any question of fact involved in the case (*Trimble vs N. Y. C. & H. R. R.*, 162 N. Y., 84). If this be so, then it is perfectly safe to say that in this case, when the defendant moved to dismiss the complaint, and said nothing more, that it amounted to a submission on his part of every question involved in

the case for the determination of the court. His conduct was equivalent to a statement by him that he rested, although he had no evidence to give. The court was authorized to determine all the issues in the case and to decide all questions of fact and law as fully as it would have been had the defendant's counsel expressed the legal effect of his action in words.

The nature and character of the judgment, whether a non-suit or something else, is to be determined, not by anything the defendant said or omitted to say, but by the disposition made by the court of the plaintiff's testimony and the issues in the case. The defendant's silence could not detract from the plaintiff's case, or convert a trial and decision on the merits into a non-suit so long as the plaintiff gave all the proof she had and rested, or, in other words, submitted the case to the judgment of the court. The defendant's silence was properly accepted by the court as an assurance that he had nothing more to say or to offer.

The action of the court in making findings of fact and stating conclusions of law denotes that the court and the parties so understood the situation, and the exceptions filed by the plaintiff to the decision of the court also show that the plaintiff's counsel could not have supposed that the decision was a mere non-suit. The cases in this and other courts show that there is considerable confusion of thought as to what is and what is not a non-suit in a given case (*Wheeler v Buckman*, N Y, 391; *Scofield v Hernandez*, 47 N Y, 313; *Van Derlip v Keyser*, 68 N Y, 443; *Forbes v Chichester* 125 N Y, 769; more fully reported in 36 N Y, 248; *Ware v Dos Passos*, 162 N Y, 181; *Woodbridge v First National Bank*, 166 N Y, 238). These authorities and especially the latter cases, show that a decision disposing of the case on the merits is properly rendered on a motion for a dismissal of the complaint. The fact that the trial court in this case made findings of fact is utterly inconsistent with the idea of a non-suit. A non-suit, as we have seen, is a decision that the plaintiff has offered no evidence upon which to find facts, and, facts can be found only upon evidence, such findings are legally impossible in the case of a non-suit, and so it has been held (*Ware v Dos Passos*, *supra*). When the plaintiff is non-suited the decision of the court is that there is no evidence upon which to find any fact, and, although it may be that the practice has prevailed of finding facts in such cases, such findings are superfluous and amount to nothing. Courts sometimes go through the form of making findings and stating therein that there was no evidence produced to establish the plaintiff's claim, but all that is implied in the non-suit itself, and it is wholly unnecessary to repeat it in a separate paper improperly called findings in the case. A statement by the court that the plaintiff produced no evidence may be a very good reason for not attempting to make any findings at all, but such a statement is in no proper sense a finding of a fact, but a reason why such a finding is impossible.

On the other hand a motion to dismiss the complaint, is proper, either at the close of the plaintiff's case or at the close of the whole case. It amounts to a request to render judgment for the defendant.

A judgment in favor of the defendant is, of course, a judgment. Dismissing the complaint is a judgment for the defendant. These forms of expression are used interchangeably and mean the same thing. It was absolutely necessary in this case for the court to make findings as it did. If the record before us showed nothing but a dismissal of the complaint the judgment would have to be reversed, since the conclusion of law would have no facts upon which to rest.

Hence, upon principle and authority, the decision in this case was a judgment upon the merits and not a non-suit. The trial court weighed the evidence, determined the intention of the parties, and held, not that the plaintiff had merely failed to prove her case, but that she had affirmatively proved the defendant's case; that after the proofs were all in it was shown from the correspondence and other proof that the defendant never made any warranty of the character or quality of the goods. This was as complete a determination of the controversy as the court could make under any circumstances, and, of course, the judgment was a bar to any other action for the same cause. When a trial results in such a situation the decision is a judgment on the merits, no matter by what name it may be called. When it appears that the plaintiff produced no proof whatever in support of the case upon which a verdict could be rendered or facts found, then there may be a non-suit, but when both parties give all the proof that they have and the court finds the facts and determines the issue, that is a trial upon the merits and its legal effect cannot be changed by giving to it a wrong name.

In this view of the case the record presents no question upon which this court can properly interfere with the judgment, and so it must be affirmed, with costs.



Four or five well-known good fellows in the same line of business recently swore off." They had never tumbled to excess, but they took a notion that it would be a good thing to quit, and accordingly quit for a period of thirty days. The agreement was drawn up in writing, and signed by each. The third day after some of the parties to the agreement began to chafe under the restraint. They had never before felt the need of a drink as badly as after the ink used in drawing up the agreement had become dry. One of them at last dropped in on one of the others, and, of course, the swearing off proposition was immediately brought up.

"I'd like awful well to have a nip," said the caller.

"Same here," was the response.

"But I don't see how we can get around that agreement."

"Neither do I."

"I read once that no document, however carefully drawn, will stand in court if it is attacked in the right way."

"I see a gleam of hope," was the reply. Let's read this agreement over carefully."

They did so, and it was discovered that the agreement did not call for thirty consecutive days, but merely for thirty days.

Claim of Husband's Creditors to Profits of Business Conducted as Agent of Wife.

In the recent decision of the Court of Appeals of Kentucky in *Blackburn v. Thompson* (January 1902, 66 S. W., 5) it was held, according to the syllabus of Edward W. Hines, Esq., formerly State Reporter, that "where the wife's success in business was due to the skill and industry of her husband, who conducted the business as her agent, real estate purchased with the profits of the business was subject to the husband's debts." It appears that the court directed that "this decision was not to be officially reported." The doctrine laid down is certainly one of interest and importance, and probably the case was not deemed worthy of appearing in the official reports because it involved merely a reiteration of principles which the Kentucky court of last resort had enunciated in previous cases. Some of such earlier decisions, cited in the opinion in the present case, are *Moran v. Moran* (12 Bush., 303) *Gross v. Eddinger* (85 Ky., 168) *Brooks-Waterfield Co. v. Erisbie* (99 Ky., 131.) The general ground upon which these decisions rest is stated as follows in *Moran v. Moran* (supra): "The insolvency of the husband does not disable him to support his family, and our liberal exemption laws secure to him against his creditors all that is necessary for reasonably comfortable living, and all that he may be able to earn beyond the exemptions should go to his creditors; and the court ought not, by conferring upon his wife the power to trade as *feme sole*, to give him an opportunity, by acting as agent for her, to place his own earnings beyond their reach."

The courts of West Virginia have adopted a similar doctrine (*Bogges v. Richards adm'r* 39 W. Va., 568.)

The weight of authority and, in our judgment, the weight of argument are against the position so taken. The general principles governing the subject in the American courts are succinctly stated in the following extract from Mr. Frederick S. Walt's treatise on *Fraudulent Conveyances and Creditor's Bills*;

"It is settled beyond controversy that a husband may manage the separate property of his wife without necessarily subjecting it, or the profits arising from his management, to the claims of his creditors.

The wife being vested with the right to hold and acquire property free from the control of her husband, the legitimate inference seems to result that she can employ whomsoever she desires as an agent to manage it. To deny her the right to select her husband for that purpose would constitute a very inequitable limitation upon her right of ownership, compelling her to resort to strangers for advice and assistance, and would perhaps seriously mar the harmony of the marriage relation. In *Tresch v Wirtz* (34 N. J. Esq?, 129) the vice chancellor said: 'A man's creditors cannot compel him to work for them. A debtor is not the slave of his creditors. The marital relation does not disqualify a husband from becoming the agent of his wife. All the property of a married woman is now her separate estate; she holds it as a feme solo, and has a right to embark it in business. She may lawfully engage in any kind of trade or barter. If she engages in business, and actually furnishes the capital, so that the business is in fact and truth hers, she has a right to ask the aid of her husband, and he may give her his labor and skill without rendering her property liable to seizure for his debts. In *Merchant v. Bunnell* (3 Keyes N. Y., 539, 541) Davies, Ch. J., said: 'This court has frequently held that there is nothing in the marriage relation which forbids the wife to employ her husband as her agent in the management of her estate and property, and that such employment does not subject her property or the profits arising from such business to the claims of the creditors of her husband.' But a husband cannot use his wife's name as a mere device to cover up and keep from his creditors the assets and profits of a business which is in fact his own. It must clearly appear that his wife is the bona fide owner of the capital invested, and that the accumulations which result from the conduct of the business are the legitimate outcome of the investments of her property" (sec. 303.)

In cases of this class, as the learned author suggests, the determination of the controversy on the merits usually turns upon whether or not the wife was the *bona fide* owner of the capital invested. In some of the Kentucky decisions above cited, although the principle is clearly laid down that accumulations or earnings representing the husband's work or skill may be reached by his creditors in any event, the same result probably might have been reached upon findings of fact that the capital or property really

belonged to the husband, and the transfer to the wife was a subterfuge. Where the wife's nominal ownership is obviously, or even fairly presumably, a mere cover for a husband's withdrawal of his own funds from the reach of his creditors, the courts may well disregard it. Considering the notorious frequency with which transfers to wives are resorted to as a fraudulent expedient, the courts should not lean toward effectuating their claims in doubtful cases. Where, however, a wife's ownership of the principal or capital is fairly established, logic as well as justice requires that the principles formulated by Mr. Wait be recognized.



"As a Man Eateth so is He."

(The Spectator.)

Is diet a passing fad of the day, or will it survive and dominate the race? The indications seem to point the latter way. To solve the problem of disease. When under-feeding and over-feeding vanish, half the umps of Pandora's box will fly off after them, and hope will remain brighter than ever. Indeed, all that man has to do is to go to the ant—not to the bee—and see how magical the power of selected food may become. It is a commonplace of knowledge among bee-keepers that feeding, and feeding alone, makes the difference between worker and queen bee in the beginning, and that if the young queens be accidentally destroyed a fresh set can be immediately raised by the busy bee nurses, who at once substitute royal food for the worker food given to the ordinary infants of the hive. Man has not yet learned the bee's secret, because he has been too busy experimenting upon outside affairs such as steam and electricity: but now that the attention of the race is once turned to diet, we may expect marvelous strides in this direction also. As the college athlete has learned to feed with a view to the laurels of the field, so the college orator may yet take a special course of diet for the valedictory—who knows? The Spectator has a fair cousin who confided to him the other day that she had learned to keep her weight at any point she desired, adding or subtracting pounds or even ounces at will by a careful use of certain foods. She further asserted that anybody could do likewise who was willing to take the requisite thought and pains. If this be true—and her demonstration was clear and convincing—why not height as well as weight, and shape as well as size? Why, not, like "Alice in Wonderland," grow smaller and larger at will by eating this or that? Lewis Carroll's fancy may have been prophetic in its flight after all, and the two sides of his magic mushroom may prefigure the marvel working diet lists of the twenty first century, though they seem as impossible to-day as the telephone and the trolley would have appeared to our colonial ancestors.

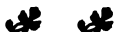
The New Woman's Position Judicially Determined.

It is said of Sam Jones that on the first morning of the day succeeding his marriage, he turned over in bed, rubbed his eyes, and directed the attention of the bride lying at his side to two collections of clothing on the backs of two separate chairs in the bridal chamber. And he said to her solemnly: "Sarah Jane, we are now about to start out on life's journey and it is well that we, here and now, settle our individual status as pertains to the marital relation for all time. You see those two piles of clothing; one is a masculine garb, and the other feminine; now, you choose which you will don and then stick to it." And Sarah Jane proceeded to get inside the petticoats as a natural selection, and Sam testifies that they have stuck to their individual costumes from that first morning.

But in recent times many decisions of this kind have gone to the court of appeals. It has been a mooted question under recent modifications of the married woman's laws, as to which is entitled to wear the breeches. Justice Purnell, of the U. S. Circuit Court of Appeals, New York, has recently rendered an opinion which seems to be sound, and which gives the new woman's claim and aspirations increased dignity. He said:

"When an intelligent, active, industrious, frugal woman finds she has married a man, who instead of coming up to the standard of a husband, is a mere dependent, who acknowledges that he is only a helpmate to his wife, obeys her instructions, pours his little earnings into her lap, acknowledges her to be and always to have been the head of the family and leaves to her its support, it would be contradictory of fact and an absurd construction of law to say that he, and not she, is the head of the family, and deny to her the benefits intended for the family and of the separate estate she has accumulated, because the title is in her and she lives with him. Certainly, there are decisions which might tend to a different conclusion, but the weight of authority is to the effect that

where the wife is the owner of the property, where she trades as a feme sole, and is the debtor, and the husband cannot and does not claim the homestead exemption, the wife, though living with her husband, may be alone, or jointly with him, the head of the family, and as such claim the homestead exemption. Under the circumstances of the case at the bar the petitioner, a married woman living with her husband, is entitled to the homestead exemption, and there was error in refusing to allow such claim."



An Unexpected Heir.

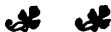
The birth of twins as claimants for part of an estate valued at nearly \$20,000, makes a very interesting problem which the Probate Court of the District has been called upon to solve.

The mother of the twins was twice married, and left three children by her first husband. She died last summer, when the twins were about two weeks old. The three children by her first husband are also living.

By her will, made a few months before her death, the mother of the twins left her estate, consisting of real and personal property, to her children by her first husband. Provision was made, however that in the event another child was born to her it should be entitled to one-fourth interest in her personal estate, which is stated to be worth about \$140,000.

Now the question arises which of the twins will be entitled to the one-fourth interest in the personal estate and what will be the share of the other. Or, again will the one-fourth interest be divided equally between the twins, or will one be entitled to a one-fourth interest, as provided in the will, and the other to a one-fifth interest of the remaining three-fourths of the personal property. Then, again, in the event that it is determined that only one of the twins is entitled to inherit the one-fourth, which will it be?

Soon after the will of the mother of the twins was filed in the office of the Register of Wills guardians ad litem were appointed for the children by the first husband, and also for the twins.



Judge Craig Biddle was escorting a visitor to Philadelphia over the city, and as they passed the penitentiary the visitor inquired blandly, "Judge, is that a new distillery?"

"Not exactly," answered the judge: "but it is a rectifying plant."

A sample of a Terse and Touching Bill of Divorce.

EDITOR BAR:

PRINCETON, W. Va., Feb. 18, 1902.

The following bill in a divorce case was passed on by Judge Sanders at the august term 1901 and might be instructive to the legal profession in the state. Suit was brought by a young disciple of Solon of the African persuasion, whose client evidently lives on the borders of Mercer and McDowell counties. Sad to relate the energetic attorney did not have the opportunity to draft a decree in his favor. s.

"State of West Virginia.

In the Circuit Court of Mercer County.

To the Honorable J. M. Sanders

Judge of the Circuit Court
Mercer County.

The bill of complaint of
Jacob Hedrick

vs

Mary Hedrick

filed in the Circuit Court of said county, the complainant complains and says that on the—— day of—— 1888 he was married to the defendant Mary Hedrick in the county of Blunt, and state of Tennessee by a justice of the Peace, who celebrated the rites of matrimony that since the said marriage he has resided in McDowell county, State of West Virginia until 1895 A. D. when the said defendant abandoned and deserted him and since the said date the said plaintiff has not cohabited with the said defendant for more than three years, and in fact does not know the whereabouts of the said defendant, and the plaintiff further avers and says that he has not received any assistance nor comfort from the said defendant since the date of abandonment in candid consideration thereof the plaintiff prays that the court may grant a decree of divorce in the above named cause and he also asks such other general relief as the court may grant.

JACOB HEDRICK, plaintiff.
Per Counsel ————"

Illustrative Evidence.

Col. C. C. Fogle, attorney-at-law, of Lancaster, Mo., related the following legal incident: "One of the most original lawyers I ever met in my life was 'Sam' Dysart, who some twenty years ago was a resident of our county. He is some kin to Major 'Ben' Dysart of your town. 'Sam', when he lived up our way, was engaged to defend a lot of boys and girls charged with disturbing a religious assembly out in the country by 'laughing and giggling.' The case attracted an immense crowd from the vicinity. T. C. Tadlock prosecuted, and he was instructed by the church people to spare no pains to convict the disturbers who were of good families, and it was their first offense. They candidly admitted they laughed out in church, and the State insisted that by their own mouths they were condemned.

"Brother Tice Spears, a rigorous man of Puritanic type, was the main prosecuting witness. He had conducted the services, and he testified that his peace was sadly disturbed by the unseemly behavior of the 'rioters.' After he told his story in chief he sat down with clasped hands waiting for the defendant's attorney to begin on him. He didn't have long to wait. The examination went like this:

"Brother Spears, you led the meetin' last night?"

"I did, sir."

"You prayed?"

"I did, sir."

"And preached?"

"I tried to."

"And sung?"

"I sung."

"What did you sing?"

"'There is a Fountain Filled With Blood,' sir."

"Here Mr. Dysart pulled a hymn-book from his pocket and handed it to the witness, with the remark:

"Please turn to that song, Brother Spears."

"The witness did so.

"That's what you sang last night?"

"It is, sir."

"Well, stand up and sing it now, if you please."

"What!"

"You heard what I said, Brother Spears."

"But I can't sing before this sort of crowd."

"Brother Spears," with much apparent indignation, 'do I

understand that you refuse to furnish legitimate evidence to this jury?"

"No—no—but, you see——"

"Your honor," said Mr. Dysart, "I insist that the witness shall sing the song referred to just as he did on the night of the alleged disturbance. It is a part of our evidence and very important. The reason for it will be disclosed later on."

"There was a long jangle between the lawyers, and the court finally ordered the witness to get up and sing."

"And, mind you, Brother Spears," said Dysart, seriously, "you must sing it just as you did that night; if you change a note you will have to go back and do it all over again."

"The witness got up and opened the book. There is a vast difference between singing to a congregation in sympathy with you and a crowd of courtroom habitués. Brother Spears was painfully conscious of the fact. You know how those old-time hymns are sung in the backwoods settlements? You begin in the basement and work up to the roof, and then leap off from the dizzy height, and finally finish the line in the basement. That's the way the witness sang. He had a good voice—that is, it was strong. It seemed to threaten the window lights. The crowd didn't smile—it just yelled with laughter. The jurymen bent double and almost rolled from their seats. The court hit his cob pipe harder and looked solemn. There were only two straight faces in the house. One belonged to a deaf man and the other to Sam Dysart. The singer finished and sat down. He looked tired. Sam immediately excused him. When the time for speechmaking came Sam remarked to the jury:

"If you gentlemen think you could go to one of Brother Spear's meetings and behave better than you have here, why you may be justified in convicting these boys and girls."

"That was all he said, but the jury brought in a verdict of not guilty, with the request that Brother Spears sing another song. But that gentleman had gone home, and court adjourned."



"It strikes me said the attorney, "you're entirely too partial to the other side."

"No, sir," cried the magistrate; "I want you to understand that I am neither partial nor impartial."—Philadelphia Record.

Judge: "How old are you, madam?"

Witness (hesitatingly): "I am—that is, I—"

Judge: "Out with it! The longer you wait the older you will grow."

Novel use of the Writ of Injunction.

The writ of injunction is, indeed, a wonderful writ. Originally its jurisdiction was limited to equitable remedies, but of late years its scope has broadened, and its aid is now invoked to restrain alike the disturber of a church meeting and to curb the emotions of the persistent lover. The writer gives in detail two peculiar cases in which the aid of a writ of injunction was recently invoked. One of Mr. John Kensit's followers, who is awaiting trial on the charge of "brawling" in church, was enjoined from visiting the church in question in the meantime for the purpose of creating a disturbance, a thing he had threatened to do. The wardens of the church, fearing a disturbance, applied for and obtained from Mr. Justice Day, sitting in chambers, a writ of injunction restraining the offender from visiting their church. This is certainly a novel use of a law writ, but people must go to church to pay and behave themselves and not to engage in unpleasant discussions on theology. The writer recalls a somewhat familiar case which happened in Suffolk county several years ago. A certain individual had a habit of going to a certain church in Boston, and in the midst of the services he would arise and proceed to call members of the congregation such names as "whitened sepulchre," etc. The man was evidently deranged and suffering from religious monomania. He was arrested, tried and convicted in both the Municipal and Superior Courts. He was called for sentence in the Superior Court before Mr. Justice Sherman, and the following amusing dialogue took place between the judge and the prisoner:

Judge Sherman—If I place you on probation, can you keep away from that church?

Defendant—No, your honor, I don't think I can.

Judge—You have no more right to make a disturbance in church than you have to make a scene in a man's private dwelling.

The judge tried to reason with the defendant in his customary good natured way, but to no avail. The defendant, having refused probation with proper conditions, was committed to jail in default of payment of a small fine.

Another novel use of the writ of injunction is seen in the following case: A certain young lady, an elocutionist and

reader, of Toledo, Ohio, has been greatly annoyed of late by the attentions of a certain well known lawyer and politician of that city. He seizes upon every opportunity of pouring into her ear his tale of love. And, while no doubt, she was pleased with the first installments, she has sickened of his wearisome repetitions. After trying both entreaties and threats, she, as a last resort, appealed to the Court of Common Pleas, which has enjoined her persistent admirer from further advances. If the injunction proves unsuccessful, she might try elocution on him. "Love," says Dr. Johnson, "is the folly of a wise man and the wisdom of a fool." As a lawyer, I am unable to see on what grounds a writ of injunction can issue in such a case; perhaps a court of equity regards unsolicited and persistent attentions from undesirable suitors as repeated trespasses. In such a case a court of equity clearly has competent jurisdiction. Time and again has the writ of injunction protected the weak and suffering from the aggressions of the rich and powerful, and to-day, at the beginning of the twentieth century, bachelor girls invoke its powerful aid to shield them from the annoying attentions of undesirable suitors.

JOSEPH H. SULLIVAN.

Of the Suffolk (Mass.) Bar.



A young man whose features and flashing eyes betoken great earnestness was summoned before Judge McCarthy of the City Court the other day for jury duty. He immediately asked to be excused. When the judge asked him what excuse he had for not serving, he replied:

"I believe it is a rule of the court that the jury is the sole judge of the facts and the court of the law—that the juror should only weigh the facts as presented by the evidence, not taking into consideration any of the rules of law governing the case; wherefore all lawyers are exempt from jury duty."

"But are you a lawyer?" asked Judge McCarthy.

"No, but I have been a close student of the law for many years."

"I am afraid that I cannot excuse you if you are not a lawyer," said the court smiling.

"But continued the young man, with great earnestness, the color mounting to his temples, "I am sure if your honor knew as much law as I do, your conscience would not allow you to serve on a jury."

After the bench and bar had recovered from this naive outburst the judge told the young man that if it was a matter which affected his conscience so deeply he would excuse him and a very much abashed youth left the courtroom.—New York Times.

Seated in the cafe of the Waldorf Astoria the other evening, a congenial party listened to New Mexico's bright young governor, Miguel A. Otero, exultating upon the resources and many attractive features of his territory. One of the group, a western mining man, asked the governor if it was not a fact that quite a large proportion of the population of Mexican birth or extraction were entirely ignorant of the English language and wholly illiterate. This condition the governor admitted had existed, but the public schools were rapidly improving matters.

"Well," said an army officer, "I am glad to hear that, for I recall an incident which occurred when I was stationed at old Fort Cummins, which didn't show the native up in a very attractive light, as to his competence for jury duty. One of our discharged men was celebrating his freedom in Silver City, and got into a row over some women in a dance hall. A man was killed and the discharged soldier—Simmons by name—was arrested for murder. There was no court being held in Silver City at the time, so Simmons was taken to another district for trial. The jury drawn in the case proved to be all Mexicans. The principal witness was a man named Gallagher, and when the prosecution put him on the stand, Simmons' lawyer said in Spanish to the jury—speaking in an undertone—'you don't want to believe anything this man says; he stole a cow up in Grant county.' In his closing argument the lawyer again referred to the cow episode, he having made Gallagher admit it on his cross-examination. The jury took the case, and after a short deliberation, brought in a verdict convicting Gallagher of stealing a cow!"—N. Y. Times.



One of the most marked characteristics of General Benj. F. Butler was his absolute fearlessness. He was not afraid of men in their official station. Upon one occasion he was making an argument before Judge Carter of the Supreme Court of the District of Columbia who had an irritating habit of interrupting counsel in the course of their remarks, for the purpose of asking a question or making some caustic comment. On the occasion referred to, Butler was citing an English case when he was interrupted by the Court with the remark, that there was plenty of law on the subject without going abroad for it. Pausing for a moment, and looking the judge full in the face, he replied that he was reading from a case that had been well considered and the opinion rendered in clear and convincing terms "without any stump speech interjected into it," and then went on reading as though no interruption had occurred, and no other was attempted. At another point in the same case he expressed his contempt for one of his legal antagonists, who was also a witness in the case, by saying, "You might as well attempt to light up a candle with a Roman candle as to get the truth out of such a witness,"

WEST VIRGINIA COURT OF APPEALS.

Decisions Handed Down at the Last
Term.

REPORTED SPECIALLY FOR THE READERS OF THE BAR.

Appearing Here For the First Time in
Print.

State vs Dry Fork Railroad Co.
Brannon, P.

From Randolph County.

Judgment reversed, new trial granted.

Syllabus

1. An indictment against a corporation need not aver that it is a corporation. If such were the requirement, however, the name "The Dry Fork Railroad Company" would be sufficient import that it is a corporation.

2. To sustain an indictment for obstructing a public road, it must be shown that the road is a public one, not merely a private road. Mere user alone without its establishment or recognition by order of the county court, or work done upon by the surveyor of roads, will not make it a public road.

3. An indictment for obstruction of a public road will not be barred by limitation, though such obstruction began more than a year before the indictment, provided it was continued within such year, as every day's continuance of it is a new offense.

4. It is not necessary in an indictment against a railroad company for obstructing a public road, to aver that it had no license to occupy or cross the road.

5. Where an exception or proviso exempting one from criminal liability is not a part of the description of the offense under a statute, though it be even in the enacting clause, it is not necessary to negative the exception or proviso in the indictment; otherwise it is necessary.

Edgell vs Smith.
 Brannon, P.
 From Wetzel County.
 Decree reversed. Suit dismissed.
 Syllabus.

1. A bill in chancery cannot be so amended as to introduce new matter and entirely change the original purpose of the suit and have relief upon a different ground.

2. Depositions proving matters not in an original bill when taken cannot be read to support substantive matters in an amended bill afterwards filed, and a decree based on such amended bill, supported by only such depositions previously taken is erroneous.

3. When an original bill shows a case wherein there can be no relief because it is based on and grows out of a conveyance fraudulent as to creditors, no amended bill is allowable to the guilty plaintiff.

4. A suit in equity cannot be maintained to cancel a deed made to hinder, delay or defraud creditors, though grantor and grantee are equally guilty, and equity will take no step to help either, but will leave them where they placed themselves under the maxim, "*In pari delicto potior est conditio defendentis.*"

5. To make a conveyance fraudulent as to creditors it is not necessary that the intent be to entirely defraud them out of their debts. If the intent is to either hinder or delay them, or defraud them by a conveyance which places an obstacle in the way of the prosecution of their legal remedies, it is void under the statute against fraudulent conveyances.

6. A conveyance by a debtor to secure his property from immediate subjection to debts of creditors is a fraudulent act on his part, and as to him void as against them, though honestly made, the debtor intending that his creditors shall be ultimately paid.

7. To set aside a deed for fraud suit must be brought without unreasonable delay after discovery.

Thomas E. Davis vs Jacob Living and others.
 Dent, J.
 From Ritchie County.
 Judgment affirmed.
 Syllabus.

1. If the defendant in an ejectment suit shows that the land in controversy has been omitted from the land books of the proper county for five successive years before the trial, he makes a *prima facie* case of forfeiture and defeats the plaintiff's right to recover, unless plaintiff can show that the land was assessed improperly in another county and the illegal taxes thereon paid or that the land has been redeemed, regranted or resold so as to reinvest the title in him.

2. If on the undisputed facts the case is plainly for the defendants all errors committed by the court on the trial are harmless errors so far as the plaintiff is concerned.

Bank of Huntington v. Napier, 41 W. Va., 481

Maxwell, Administrator, vs Leeson.

Brannon, P.

From Doddridge County.

Decree reversed. Remanded.

Syllabus.

1. Where the plaintiff in a judgment or decree for money dies, it is not necessary that a writ of *scire facias* to revive and have execution in the name of his personal representative against the defendant still living should make terre-tenants parties, and an award of execution upon a *scire facias* which keeps alive the lien of the judgment or decree on land as to the defendant, will also keep the lien alive as to the terre-tenants, though not parties to the *scire facias*.

2. The lien of a judgment upon land exists, though execution may be suspended by the death of the defendant, and may be enforced in equity without revival by *scire facias* so long as the *scire facias* may lie on the judgment.

3. *Scire facias*. Office of to revive a judgment.

4. The lien of a judgment upon land arises from the judgment *per se* irrespective of execution upon it so long as the judgment is not barred by limitations.

5. To a *scire facias* to revive a judgment payment, release, set-off or other matter arising after judgment, may be pleaded, but not any matter existing prior to the judgment.

6. A privy in estate is not effected by a judgment against him from whom the privy derived his estate rendered after such privy acquired his estate.

7. An order reviving a judgment and awarding execution for money in the name of a personal representative of a deceased party for a less sum than the original recovery by reason of partial payments since the judgment is not void as a new judgment or because of variance in amount from the original judgment.

James Brown, Appellant,

vs

W. Gorsuch & Sons, Appellees.

Dent, J.

From Mason County.

Reversed and remanded.

Syllabus.

1. In an attachment suit in equity against a partnership where the attachment is levied on the social assets, it is necessary that the partners should both be before the court either by actual or constructive notice before any decree be made in relation to such property.

2. It is error for the court to abate such attachment and dismiss such suit when one of the partners has been served with summons because an order of publication has not been taken against the other, but the court should require the plaintiff to mature his suit within a reasonable time fixed as to such absent partner, or suffer the abatement of the attachment and dismissal of the suit.

John Porter, P. and D. E.,

vs

John Mack and Greenberry B. Boren, D. and P. E.

Dent, J.

From Hancock County.

Reversed.

Syllabus.

1. A declaration charging a conspiracy to sacrifice and destroy plaintiff's property and business by the malicious use of judicial proceedings must allege that such proceedings were instigated, instituted and prosecuted to a finality by the defendants without probable cause.
2. There can be no conspiracy to do that which is lawful in a lawful manner.
3. The malicious doing of a lawful act in a lawful manner is not actionable.
4. If a person agree to pay the debt of another to a third party and either pay it or be in condition to pay it and having control of such third party's debt, wilfully ignoring his obligation, maliciously institutes judicial proceedings and carries them through to a finality in such third party's name for the purpose of sacrificing the debtor's property and destroying his business, such proceedings are without probable cause, and render such person liable to an action for malicious prosecution. If there are more than one of such persons they are liable in an action on the case for conspiracy in the unlawful use of judicial process.
5. If a person who has assumed to pay the debt of another be not in condition for any reason to do so, and at the same time he is the agent for the creditor and it is his duty as such agent to collect such debt off the debtor, his performance of such duty by legal proceedings is not without probable cause, and will not render him liable to a suit for malicious prosecution, although the debt, interest and costs may be recovered from him in an action of assumpsit for breach of his contract.
6. It is unlawful for a malicious purpose to institute judicial proceedings without probable cause.
7. The common law action of conspiracy is obsolete, and in lieu thereof an action on the case in the nature of a conspiracy has been substituted.
8. In such action the grounds or gravamen thereof, whether one or more, must be set out with the same certainty as though it were an action against a single defendant. Conspiracy is only added thereto as matter of aggravation or jointure and need not be proven, but judgment may be had against one defendant and the action discontinued as to the others.
9. Where the damages claimed in two separate actions, to-wit, assumpsit and malicious prosecution, arise or result from the same acts of abuse or unlawful use of judicial procedure, a final judgment in one is a bar to the further prosecution of the other, although much greater damages might have been recovered in the latter than in the

former. Such excess of damages is regarded as waived and the wrong fully satisfied by the judgment obtained in the former, and cannot be relitigated in the latter action.

10. An action for malicious prosecution sounding in consequential and punitive damages, although affecting business and property, is such a personal action as does not survive to the personal representative, and is barred by the statute of limitations after one year from the time when the right to bring the same first accrued.

11. Where two separable grounds of action are included in the same declaration, the defendant may file separate pleas as to each of such grounds of action.

12. The want of probable cause is an essential averment in an action on the case for malicious prosecution, the proof whereof devolves on the plaintiff.

13. To sustain such averment the plaintiff must show such a state of facts as precludes a reasonable ground of belief in the minds of defendants warranting them to institute and maintain in good faith the alleged malicious proceedings.

14. If the defendants being men of ordinary prudence believed in good faith from their own knowledge or understanding of the facts and circumstances or from information received from reliable sources that the judicial proceedings instituted by them were necessary and justifiable, they cannot be held liable, although it should be afterwards made to appear in a suit for that purpose by a preponderance of evidence that such proceedings were without just foundation.

15. On the question of probable cause the facts and circumstances, knowledge and information, must be viewed from the standpoint of the defendants, and not that of the plaintiff, and if they in good faith, being men of ordinary prudence, entertained the reasonable belief that it was their duty to institute and maintain the proceedings complained of, they cannot be held liable therefor in an action on the case in the nature of a conspiracy for malicious prosecution.

16. When the law as applied to the facts shown in evidence is plainly for the defendants, the court should instruct the jury to return a verdict accordingly.

Board of Education, Randolph County,

vs

Jacob G. Ward and others.

C. H. Scott, Appellee.

Dent, J.

From Randolph County.

Appeal dismissed as improvidently allowed.

Syllabus.

1. An *ex parte* order making allowances to an attorney for legal services out of funds in the control of the court is non-appellable. If erroneous, the proper remedy to correct it is by motion in the lower court.

THE BAR.

Ohio River Railroad Co. vs William Johnson, Jr.

Dent, J.

From Wood County.

Reversed and bills dismissed.

Syllabus.

1. A judgment by default, agreement, confession or trial is an estoppel against the relitigation of all such direct questions as were or might have been in issue and determined thereby in a collateral proceeding in equity between the same parties.

2. Where the grant of the right of way fifty feet wide to a railroad company calls for a certain, fixed and determined center line, the construction of the track on either side of such center line will not shift such center line to the center of such track, and thus shift such right of way without the consent of the grantor.

3. In a suit involving the true location of such right of way, the burden is on the railroad company to prove that either it constructed its track on such center line, or that the grantor consented that the center line might be shifted to the center of such track wherever located.

4. A railroad company is not bound without covenant to that effect to construct its track on the center line of its right of way.

5. A title bond duly acknowledged and recorded conveying a full and free right of way, fifty feet wide, with the necessary ground for cuts and fills, to a railroad company for railroad purposes without reservation is a sufficient grant of such right of way under the laws of this State.

6. A railroad company can acquire title to property by adverse possession.

7. In a case of grave doubt equity will not grant relief, but will leave the parties to their legal remedies.

8. Laches alone is sufficient to bar equitable relief, especially when it has been so long continued as to render the relief sought doubtful, uncertain, unfair or unjust.

Long and Devers, Appellees, vs George E. Willis et al., Appellants.

Dent, J.

From Harrison County.

Affirmed.

Syllabus.

1. Persons who are not parties to a suit and not bound by the decree entered therein cannot be prejudiced thereby.

2. Where a commissioner's report is confirmed without exception this court will not look into the evidence on which it is founded or by which it might be affected, but will accept the findings of such commissioner as to all facts depending on extrinsic evidence as final and conclusive.

3. Process to answer an amended bill before or after it is filed is good.

James Hanley and others,
vs
County Court of Randolph County and others,
John P. Conn, Appellant.
Dent, J.
From Randolph County.
Decree reversed.
Syllabus.

1. A county court has the authority to determine whether the building of a new court-house should be postponed until a vote can be had for the re-location of the county seat and such determination is final and not reviewable by injunction or otherwise unless such vote has been ordered and is pending when by proper proceeding the wrongful action of the court will be controlled.

2. A defective notice of the holding of a special term of the county court is not sufficient grounds on which to base an injunction.

3. An injunction obtained without just legal grounds for the ostensible purpose of preventing the county court from incurring indebtedness inhibited by Section 8, Article 10, of the Constitution, while its real purpose is to aid in the re-location of the county seat, when such purpose is accomplished, should be dissolved and not perpetuated.

4. A county court has the right to appropriate the funds on hand and those to be raised by the levy of the present fiscal year for the purpose of erecting necessary county buildings, including a court-house, and to enter into contracts with this end in view without thereby creating an indebtedness in violation of Section 8, Article 10, of the Constitution.

5. A suitable court-house is a paramount public necessity in every county.

Harvey Lawson et al., vs W. E. Kirchner.
Dent, J.
From Tyler County.
Affirmed.
Syllabus.

1. Where a debt or demand is payable to infants, suit therefor is properly brought in their names by their next friend, although the money when recovered goes to their guardian.

2. An oil lease for oil and gas purposes is a conveyance or sale of an interest in land conditional and contingent on the discovery and reduction to possession of the oil or gas.

3. A person who accepts an oil or gas lease with a stipulation therein contained to pay a monthly rental until a well is completed or until the expiration of a certain fixed term is bound to pay such rental, although he does not within such term enter upon the land and complete such well, unless he was prevented from doing so by the plaintiffs and not by mere personal default.

John F. Pittinger and P. A. Pugh, Executors, &c.,

vs

Oliver S. Marshall, &c.

Dent, J.

From Hancock County.

Reversed and remanded.

Syllabus.

1. Where a chancery cause is referred to a commissioner to settle the accounts of a trustee who is a member of the legislature, it is irregular and illegal for such commissioner to proceed to take proof, settle and determine such accounts during the absence of such legislator in attendance on the session of the legislature, and for one day for every twenty miles he is necessarily compelled to travel in going to and returning from such session.

2. The trials of civil, criminal and chancery suits are all included within the inhibition of Section 5, Chapter 12, Code.

Lorama Crumrine, now Duty, and John C. Crumrine,

vs

Gussie M. Crumrine and others.

Dent, J.

From Wood County.

Affirmed.

Syllabus.

1. Where a husband receives funds belonging to his wife and with her knowledge and consent invests it in real estate in his own name, the law raises a *prime facie* presumption of a gift.

2. When a father receives funds in trust for his children and invests them in real estate for their benefit, although he takes the title in his own name, he thereby creates an express trust in their behalf which a court of equity will enforce.

3. When funds are received in express trust the lands in which they are invested, will be regarded as held under the same character of trust, being a substitute for the funds.

State vs C. E. Haddox, Warden of the Penitentiary.

Dent, J.

Writ of mandamus refused.

Syllabus.

1. If a prisoner pending a sentence of death obtain a writ of error to this court, and thereby delay the execution of such sentence until the time fixed therefor has passed, and the judgment is afterwards affirmed, it is the legal ministerial duty of the trial court, without requiring the prisoner to be again brought before it, to enter an order fixing a further time for the execution of such sentence.

2. After a sentence of death has been passed upon a prisoner his trial is at an end, and he has no right and there is no necessity for his presence at the further ministerial steps necessary to be taken to carry into execution such sentence. The final denouncement alone requires his presence.

The President Protected

The Senator of the U. S. has finally agreed upon a law which is designed to hedge the President about with penalties that will deter the anarchist. The first section of the law provides:

That any person who shall, within the limits of the United States or any place subject to the jurisdiction thereof, wilfully and maliciously kill or cause the death of the Vice-President of the United States, or any officer thereof upon whom the powers and duties of the President may devolve under the Constitution and laws, or who shall wilfully and maliciously cause the death of the sovereign or chief magistrate of any foreign country, shall be punished with death.

Subsequent sections provide also the death penalty or life imprisonment, for attempts to kill; for advising to kill; for conspiring to kill; for written or printed words threatening to kill; and for aiding any one to escape who has killed. The law then provides a body-guard for the President as follows:

Section 7. That the Secretary of War is authorized and directed to select and detail from the Regular army a sufficient number of officers and men to guard and protect the person of the President of the United States without any unnecessary display.

And the Secretary of War is authorized and directed to make special rules and regulations as to dress, arms and equipment and duties of said guard, and shall publish only such parts of said rules and regulations as he may deem proper.

That the additional expenses of such guard so detailed shall be paid out of the Treasury on accounts to be certified by the Secretary of the Treasury.



There is a good story told of an advocate that, on an occasion when he had drank rather freely, was called on unexpectedly to plead a cause in which he had been retained. The advocate mistook the party for whom he was engaged and, to the amazement and consternation of the agent who had feed him and of the poor client, he delivered a fervent speech directly opposite to the interests he had been called upon to defend. Such was his zeal that no whispered remonstrances, no jostling of the elbow could stop him, until just as he was about to sit

down the trembling client, in a brief note, informed him that he had been pleading for the wrong party. This intimation, which would have disconcerted most men, had a different effect on the advocate, who, with an air of infinite composure, resumed his speech. "Such, your honor, is the statement which you will probably hear from my learned brother on the opposite side of this case. I shall now, therefore, beg leave in a few words to show your honor how utterly untenable are the principles, and how distorted are the facts, upon which this very specious statement has proceeded." He did not take his seat until he had completely and energetically refuted the whole of his former argument.



A Strange Experience.

BY JOHN DE MORGAN, IN GREEN BAG.

It is not given to many men to be hanged and buried, and yet live to tell the tale, but such was the experience of one John Bartendale, who was executed at York in 1634 for felony. After his body had hung for nearly an hour, it was buried. A gentleman passing by the grave, which had not been filled up, thought he saw the earth move, and with the help of a servant, he disinterred the convict, who was still alive. It was the custom, in those days, to bury suicides and executed criminals without any coffin. The man was carefully treated, and entirely recovered. He became hostler at the coaching house in York and lived a most exemplary life. When asked what he could tell in relation to hanging, as having experienced it, he replied: "That when I was turned off flashes of fire seemed to dart from my eyes, from which I fell into a state of darkness and insensibility." The incident is referred to in a rhyming itinerary, known as "Drunken Barnaby's," which used to be very popular with street vendors in the North of England.

A piper being here committed,
 Guilty found, condemned and titted;
 As he was to Knavesmire going,
 This day, quoth Boys, will spoil thy blowing;
 From thy Pipe th'art now departing;
 Wags, quoth th' Piper, you're not certain.
 All which happen'd to our wonder,
 For the halter cut asunder,
 As ode of all life deprived,
 Being bury'd, he reviv'd;
 And there lives and plays his measure,
 Holding hanging but a pleasure.

Stories of Jackson.

In his "Memories of a hundred Years," now being published in the Outlook, Dr. Edward Everett Hale (who, by the way, reaches his eightieth year on April 3) recounts some of the tales which were circulated in Boston in derision of the rough-and-ready President. He says:

I remember very well the anecdote in which Mrs. Jackson was supposed to give an account of a lung fever of which, I think, she died. It was declared and believed in Northern circles that she said, "The General kicked the kiverlit off, and I kotched cold." I should not tell the story but to record the resentment of a true lady, a relative of my own, who had seen all the elegancies of the best Courts of Europe, and who protested to me that Mrs. Jackson was a lady through and through, in breeding as in daily manners. My friend quoted the anecdote which I have told, only as an illustration of the bitterness of partisanship at that time. On the other hand, if any story can be received at the distance of one person from the spot of which the story told is true, the story which I will now record is true: The daughter of a Massachusetts Senator told me that in her younger life she went with her father to one of the regular dinners at the White House. General Jackson himself took her out to the dinner table. There was some talk about the light of the table, and the General said to her, "The chanticleer does not burn well." She was so determined that she should not misunderstand him that she pretended not to hear him and asked him what he said. To which his distinct reply was. "The chanticleer does not burn well."



A lawyer once asked the late Judge Pickens, of Alabama, to charge the jury that "It is better that ninety and nine guilty men should escape than that one innocent man should be punished." "Yes," said the witty judge, "I will give that charge; but, in the opinion of the court the ninety and nine guilty men have already escaped in this county."

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MR. O'CONER once gave in his incisive way a useful hint to all lawyers: "Cross-examination is an amusement indulged in by the very young. It is like trying to pull the tiger out of his den. You may pull him out, or again he may pull you in."



IN a New York police court the other day the justice called for a certain accused, who was a woman, and in jail awaiting sentence. The officer reported that she had divested herself of every vestige of clothing and refused to leave her cell; and said the officer, "I will leave the police force before I will bring her down in that shape."

"Never mind, officer," said the judge, "I'll give her sixty days by telephone. You can inform the lady."

The police are now wrestling with the problem of conveying her to the penitentiary.



JUDGE WILLIAM K. TOWNSEND, of the United States Circuit Court, gave some advice to his class in the Yale law school, wherein he is a professor, the other day that brought a smile to the students. He said:

"In your early days as ministers of justice some of you may find it pretty hard to get enough to eat. Then perhaps you'll be called to settle a dispute over a cow, and perhaps you may feel pretty hungry on that day. So before your case comes into court you can take the disputants to see the cow."

"When you get them out there get one of them to take hold of the horns of the cow and the other the tail, telling them that he who succeeds in first moving that cow shall have possession of her. Then, while you get them pulling with might and main, the one at the head of the animal, and the other at the tail, calmly sit down and milk the cow."

The Question of Suffrage In the South.

A CONSTITUTIONAL Convention has been sitting in Virginia from—almost time immemorial—trying to agree on the question of suffrage.

It has not accomplished it yet.

But this ought to be a very easy matter.

Conceding, as a major premise, that all classes of citizens of this Republic who are sane, possessed of property, and capable of exercising the right intelligently, ought to be allowed a vote, we have done away with the chief element of the controversy.

And that much, we think, ought to be conceded.

But that every voter's vote should weigh as much in the ballot box as every other voter's vote is another and more difficult question, which is not to be so generously conceded.

From our standpoint we do not think it ought to be conceded because it is unfair.

In other words, we do not think that the vote of Senator Elkins or Scott, or Governor White, should be set over against the vote of an ignorant negro, or a freshly imported Hun or Slav, and weigh no more in shaping the affairs and policies of this State than that of such a class of voters.

We believe that American citizenship should be exalted; that Americans should rule America; that a man should have a certain supremacy as a birthright; and that it is asking too much that the native-born American citizen should stand on the same equality with the voter of another race and another nationality when he goes to the ballot box.

How many vexed questions of negro supremacy, of property qualification, of illiteracy, of representation and the right of suffrage in all its ramifications would be easily settled if every American citizen were accorded his plain right of an additional

vote as a birthright, and could march to the polls armed with his two votes as a security against the constant incursion of other races and other nationalities to deprive him of the government and control and possession of the land he has conquered by his sword, and whose government he has conceived and founded by his superior intelligence?

Let Virginia set the standard of manhood suffrage at one vote; of the birthright of American citizenship at one vote; and of native Virginians in all State affairs at one vote, and she will thus inaugurate a plan of suffrage which will solve all her problems, and which all the States will in time adopt.



The Annual Publication.

THE annual pamphlet of the State Bar Association, containing the addresses and papers delivered at the last meeting, and other matter, is now ready for delivery, and will be mailed to all members as usual, and to all others who care to write to the Secretary, Hon. Jno. W. Davis, requesting it.

It is due to the Secretary to say that he is not responsible for the hotch-pot manner in which the matter of the pamphlet is arranged. The incongruous arrangement of the matter was due to various portions of it being delayed by the authors, making it necessary for the printer to use what he had in hand at any particular time without knowing whether any more would ever come in, and printing and giving it place without reference to any propriety of arrangement.

The printing of the annual publication is a source of trials and tribulations that the average member has never dreamed of.

But the matter of the 1902 publication, irrespective of its arrangement, is choice. It is worth reading from cover to cover, and, we doubt not, will be read by the whole bar of the State with interest and profit.

Judicial Nominations.

AT the last meeting of the State Bar Association a recommendation was made to the Legislature to provide for the holding of judicial nominating conventions separate from the political conventions.

It was a good thing to recommend, because it ought to be done; but the recommendation is all there is in it.

Nobody will give it a thought until the next party conventions are held, when the politicians will settle it as usual by log-rolling through a lot of partisan nominees.

Mr. C. D. Merrick suggests that if the "wicked city" of Chicago and county of Cook can secure and maintain an almost Utopian plan of selecting judges, West Virginia might at least aspire to one half as good.

Our understanding of the Chicago plan is that the Bar Association nominates an equal number of Republican and Democratic lawyers, from which the bar of Cook county must select a name for each judgeship on the ticket, and only those thus nominated are eligible as candidates for the bench.

We hope the Committee on Judicial Administration and Legal Reform will take it upon itself to frame a bill along the line of the Chicago plan or some other good plan and present it to the Legislature for adoption and then see that it is adopted. Unless the matter is taken in hand by somebody who will do something practical, nothing will be done.



Charles II. once granted an audience to the courtly Quaker, William Penn, who, as was his custom, entered the royal presence with his hat on. The humorous sovereign quietly laid aside his own, which occasioned Penn's inquiry:

"Friend Charles, why dost thou remove thy hat?"

"It is the custom," he replied, "in this place for one person only to remain covered."

The Goat in Court.

MUCH speculation and curiosity has always hovered around the traditional goat that figures in the initiatory ceremonies of every secret association.

To the adult imagination it has always been as real a thing as the story of Kris Kingle is to the child, but the adult has had no more luck in discovering the goat than the child who has slept with one eye open on the night before Christmas has had in seeing Kris come down the chimney.

But the tradition of the goat has at last been verified. The arm of the law has been reached out, and the goat itself has been compelled to appear in court and answer for too much bucking.

In the trial of a case in a South Carolina court the other day the plaintiff was seeking damages for injuries received by the bucking of the goat, and the goat was brought into court to give an ocular demonstration of his performances. This is the report of what occurred when the goat was brought in :

"The production in court of the offending 'Billy' was the sign for merriment that had to be checked by the doorkeepers. The goat was mounted on wheels with a powerful spring mechanism operated by a handle in the rear of the seat on which the man to be initiated sat. The counsel for Mitchell tried to operate it, but could not. Then the defendants volunteered their services, and one occupied the goat. The goat "bucked," and Judge, lawyers and spectators laughed heartily.

"The Rev. J. L. Oats testified for the defence, and said he had helped initiate Mitchell and had walked by his side, when the goat pitched him over his head. Attendants had caught

Mitchell and he landed on his feet. . Mitchell said he was hurt, got angry and wanted to fight.

"Just before being thrown Mitchell was laughing and told the goat to "get up," and it did so. Mr. Oats said he had ridden the goat, and others testified to taking the same exercise."

What the outcome of the case was the report does not reveal.



At Caruthersville, in the southeastern part of Missouri, the grand jury had returned quite a number of indictments against parties for carrying concealed weapons, and among those who had thus violated the law was a well-to-do saloon keeper. When his case came up, the defendant having pleaded guilty, the judge said:

"Stand up, Mr. Blank."

The defendant did as requested, and the judge, somewhat severely, exclaimed:

"Mr. Blank, I fine you fifty dollars."

"All right, Judge!" cried the saloon keeper delightedly. "I've got it right here in my pocket," slapping his wallet boastingly.

"And three weeks in jail," continued the judge. "Have you got that in your pocket, Mr. Blank?"



"There is no doubt," said the student of law, "that many people have been imprisoned, although innocent of any crime."

"I know that by sad experience."

"You don't say so! Let's have the story."

"There's no story to it. I merely had the bad luck to be drawn on several juries that were locked up over night."
Washington Star.



Guide: "That is the house of Dr. Samuel Johnson. It was bought recently by the public authorities."

Chicago tourist: "So I've been told. If I'm any judge of real estate, they could have got a better piece of property for less money."

A Model Mayor.

WE have had all kinds of judicial orders and samples of unique pleadings from Justices of the Peace, but the following is the only one we have seen from a Mayor, and it beats the field. To those Mayors of the larger cities of West Virginia who are at a loss for the form of a proper order, we present this as a sample coming from the distinguished Mayor of a small town, from which they may learn something:

Town of Harmon

vs

Sherman Wyatt.

This day Sherman Wyatt being brought before me, S. H. McLane, Mayor of said Town by S. Snyder, Sergeant, on a charge of being drunk and disorderly and said Wyatt plead "guilty" whereupon he is fined one dollar and costs. Said Wyatt having no ready money and being a man not possessed of much of this world's goods, he proposed to work out his fine with fear and trembling, whereupon he is hired by the Sergeant to one Hayes Cooper to assist in hauling stones from his premises.

Said Wyatt worked well until noon, then being moved and seduced by the Devil, he refused to eat at Snyder's restaurant and Hayes Cooper carried him his meal on a charger. Said Wyatt eat heartily and with much relish until his appetite was appeased.

After the noon hour said Wyatt went to work again picking stones for a brief space of time, when his mind reverted to his entertainment the night before and he hastily decided to obsequatulate and flee the wrath to come, whereupon he took to his heels and fled to the mountains of Hepsidam where the Jackass brayeth and the wicked cease from troubling.

This the 26th day of March 1902.

S. H. McLANE, Mayor.

The Judiciary Pre-eminent.

[An address delivered before the woman's law class of New York University
by Dr. I. F. Russell, D. D.]

DR. RUSSELL spoke, in substance, as follows:
“In countries under the reign of law the most striking feature of public government is the pre-eminence of the judiciary. It has been said that the three great governmental departments, the legislative, the judicial, and the executive, are, or ought to be, equal, co-ordinate and independent. To deny this—we are told—is to make a plea for despotism and to unsettle the very foundations of civil liberty.

“The jealous separation of legislative, executive and judicial duties, the maintenance of a system of checks and balances between them, and preventing one from encroaching upon the just authority of the other—this is conceived to be the very essence of free representative government.

“Still many qualifications of this broad principle appear in our own modern life. The unity of the executive office gives a brilliant and conspicuous position to the President of the United States, classifying him with Kings and Emperors, and dwarfing into personal insignificance and hiding in obscurity the many Senators and Judges who swarm in the other departments of the public service. The legislative chamber, cherishing perhaps the traditions of parliamentary omnipotence, has the glory of the initiative and the power which comes from holding the purse strings of the nation. The German Emperor once said: ‘I would have a royal, not a parliamentary army.’ This royal army brings the Kaiser always to the center of the stage, and makes the war-lord, if not the most powerful, certainly the most dangerous and absorbingly interesting personage in Europe. The judiciary in Germany, instead of reaching a plane of equality with the Reichstag and the Kaiserate, is rather an appendage to the executive.

“In England so far is the legislative authority above the

executive, that the legislature may be said to appoint the cabinet; and, as cabinet officers sit in Parliament, we may fairly say that the high officers of administration are merely an executive committee of the House of Commons. The great measures of legislation at Westminster, which agitate the empire and attract attention beyond the seas, are bills framed by the members of the ministry on whom the responsibilities of leadership rest. Thus we see that in England the executive legislates. In another sense the parliamentary majority in the Commons controls the judiciary. This is done through the Lord Chancellor, by whom judicial honors and preferment are dispensed; while the Lord Chancellor himself comes into office and goes out with his political friends who control the majority in the Commons and thus rule the Empire.

"In the United States, however, the judiciary occupies a much more exalted place. Little attention was given to this subject till the great case of *Marbury vs. Madison* was decided by Chief Justice Marshall. Here the doctrine was first authoritatively announced that legislative acts are subject to be set aside for unconstitutionality by judicial determination. To-day, in Brooklyn, the Constitution of the State is invoked against the encroachments and usurpation of the executive. With us the people only are sovereign. There is no responsible authority under the American constitutional system. The Legislature is not omnipotent; and even the King can do wrong. Only the judiciary in the court of last resort can never err. This pre-eminence of the judiciary did not escape the notice of Jefferson, who never accepted Marshall's statement of the law, and always trembled in the strong shadow cast by the Supreme Court under that great jurist.

"Finally, the judiciary has the power of practical legislation. The vast bulk of our statutes is simply a parliamentary restatement of pre-existing rules evolved originally through adjudication. The Constitution itself, though written, has been steadily developed through the progressive decisions of the United States Supreme Court, which have added new sections in

spirit without any literal extension of the instrument, and have silenced other sections which still hold their place in the body of the document. This marvelous function of judicial legislation is not a usurpation by the court, but is simply the exercise of authority constitutionally granted.

"From time to time our Supreme Court has occasionally refused to take cognizance of political and economic matters, referring them with great modesty to the President as the head of the political department, or deferring, on questions of the rate of taxation and financial policy generally, to the ultimate wisdom of Congress. But quite as often have our whole diplomatic policy and our expanding empire, as well as our domestic institutions, our tariffs and our excises, our currency and our taxes, been submitted for final determination to the judgment of the Supreme Court.

"The judiciary is, therefore, the ultimate and transcendent authority in countries which have written constitutions. In America the bench is loftier and mightier than anywhere else on earth; and on the honor, purity and independence of our Judges rests all of our rights to property and all of our liberties as citizens."



A STORY comes from Washington to the effect that a few days ago Senator Hawley, of Connecticut, Chairman of the Committee on Military Affairs, politely pointed out some of the interesting decorations in the committee room to a party of rural visitors, who were evidently strangers to the Capitol. As they left him one of the ladies slipped a silver quarter into his hand, and when the astonished Senator asked why she offered to pay a United States Senator for an act of courtesy, she said with perfect simplicity:

"Oh, excuse me; I thought you were a doorkeeper."



London has 5,272 barristers and solicitors.

An Interesting Decision Relating to Assessment of Lands for Taxes.

JUDGE HERVEY, of the Ohio County Circuit Court, has decided a question of practical importance relating to the correction of land assessment, and his opinion may be of interest. The question is one which often arises, and yet is hardly likely to go to the Court of Appeals. An assessment of real estate was sought to be maintained on the ground that it was not assessed above its cash selling value, and it was claimed that the fact that the neighboring lands of others, as a general rule, were assessed below their cash selling value was not to be taken into consideration.

In the matter of petition of Geo. W. Woods and others for correction of assessment, Judge Hervey said in part:

It is well to state that in the conclusions to which I have arrived in this matter I have been governed by the following rules:

1. The statute fixes the fair cash value of lands as the basis upon which an assessment is to be made, and this rule is to control not only the assessor, but the Board of Commissioners and the Circuit Court on appeal. But while this is the basis of valuation it is the basis fixed by statute for the guidance of the assessor, and it must be presumed that, as a general rule, the assessor adhered to this basis of valuation in placing values upon all of the tracts of land included in his assessment. If this presumption does not obtain there is no basis of comparison when we review assessments. In reviewing any particular assessment how are we to fix the fair cash value as required by statute? Are we to ascertain from witnesses familiar with the land its value by having them give their opinion of that value or by finding out what is the selling price of that or similar land? If such an inquiry was for the purpose of making the original assessment this would be a fair method, such method, indeed, as the statute prescribes.

But shall such a method be adopted to upset and overturn the rate of valuation adopted by the assessor? It seems to me that this ought not to be done. It is to the assessor that the statute addresses the requirement that the land shall be assessed at a fair cash value, and the assessor having adopted this as his rule it is by

his estimate of values that we must test the fairness of his assessment. If, therefore, any particular assessment is complained of the proper method of determining the fairness of the valuation is by comparing it with assessments placed on lands of about the same kind and value in the same vicinity. This rule tests the fairness of the assessor's work by the rule adopted by him for his own guidance. The cash value of land as thus ascertained from the assessor's methods of valuation may not be the selling price of the land nor yet the value of the land as fixed by the opinions of witnesses, but it is the only rule by which equality and uniformity can be secured. It not only fairly carries out the purpose of the statute, but puts the statute in harmony with the constitutional provision concerning equality and uniformity of taxation. I assent to the doctrine laid down in *People vs Bank*, 101 U. S., 143; *People vs Weaver*, 100 U. S., 539.

An assessment can not be justified which places the full cash value upon one man's land and puts that of his neighbor at one-half or one-third their value. And in correcting such an assessment the inquiry is what is the value of land as compared with land of like kind, and what is the value placed by the assessor on such lands.

2. From what has been said it is apparent that not much weight is to be attached to the testimony of witnesses who make guesses at the value of lands, without giving the grounds upon which they base their opinions. This is especially true where witnesses distinguish the value of lands for assessment purposes from their market value. In such cases there is no rule by which the accuracy of the estimates made by witnesses can be tested or the soundness of their judgment determined. A witness might compare the assessed values of neighboring parcels of land with the assessed value of the particular tract in question, and by comparing the actual values of the tracts as known to him say whether the assessment was fair or otherwise. But in such a case the facts upon which the witness based his judgment should be given by him and appear in the record; and his opinion would be entitled to such weight as the facts given by him would show that it was entitled to.

3. A correction of assessment made by the Board of Commissioners should be based on evidence. I do not believe that the Board should increase or decrease the assessed value of a tract of land because in

their judgment such change should be made unless that judgment is supported by the evidence. The statute provides that "if upon hearing the evidence offered" the court is of opinion there is error it shall be corrected. The Commissioners cannot, therefore, increase the value of any tract owned by the applicant unless the evidence taken at the hearing shows that it is assessed at too low a rate; and that fact should be shown by comparing the assessed value of the land of the applicant with the assessed value of lands of like kind in the same vicinity.

* * * * *

The fact that there is one tract in the vicinity which is assessed at a much less rate does not give the petitioner the right to have her land reduced to the same rate. If it appeared that the petitioner's land was assessed above the valuation placed on lands generally in that vicinity the case would be different. But to cite an instance or two of lower assessments does not establish that proposition.

The assessed value should remain as now fixed.



The Jefferson Memorial Road.

At Charlottesville, Virginia, an association has been organized, with General Fitzhugh Lee as President, to construct a Memorial Avenue connecting the home and grave of Thomas Jefferson with the community so intimately associated with his fame and with the University which was always near to his heart. Many people do not realize that the founding of the University of Virginia brought greater satisfaction to the venerable statesman as he reviewed his long life than the fact that he had been Governor of his native State, or Minister to France, or Secretary of State, or President of the United States. He once wrote: "Could the dead feel any interest in monuments, the following would be to my *manes* most gratifying: 'Here was buried Thomas Jefferson, author of the Declaration of Independence, of the Statute of Virginia for Religious Freedom, and Father of the University of Virginia.' " It is not surprising, then, that those who revere the great man choose as a memorial to him the construction of a noble avenue which shall traverse the four miles of beautiful country between the University and Jefferson's home at Monticello. Furthermore, the enterprise should also advance the movement for good roads in the United States by serving as an example for every district of the Middle Atlantic and Southern States.

Texas Justice as Administered Fifty Years Ago.

THE veteran jurist, Judge Gary, of Illinois, gives this picturesque description of a criminal trial in Texas fifty years ago :

"The presiding Judge was a bankrupt merchant of great intellectual ability, of polished and pleasing manners and with a very fine taste in whiskey. The bar from which it was dispensed was the only one at which he had ever practiced.

"In that village of San Miguel, a few days before the meeting of the court, a big Texan, who was migrating through the Territory of New Mexico toward the gold fields of California, had bored a hole through the body of a comrade, by shooting him in the back, at a distance of about twelve feet, with a musket loaded with two ounce balls. The victim, being of a not robust constitution, nor inured to hardships, fell dead in his tracks. The act was playfully done, without any special motive, but the unsophisticated natives took a serious view of the transaction, captured the Texan and confined him. Perhaps I am in error when I say they confined him, for I have the impression that there was no jail or other secure place of confinement. It may be that they bucked or pegged him out, but any inaccuracy as to minor details does not affect the substantial truth of my narrative.

The court met. Very soon after it was organized the grand jury, under the charge of the Judge and the guidance of the Attorney General, returned as a true bill an indictment against the Texan, charging him with murder. He was brought into court a prisoner, arraigned, and by shaking his head pleaded not guilty. I do not recollect that I met any member of the legal profession at that court other than the Attorney General, and by virtue of his office he was the prosecutor. The Judge being informed that I was a member of the bar of the State of Missouri who had recently come to the Territory, and that I hoped to practice my profession there, assigned to me the duty of defending the Texan. I requested a little delay that I might consult with him. My request was granted, and, retiring with him to a sort of a closet, which had no outward opening, I asked him some questions as to his previous acquaintance

and intercourse with the dead man, to all of which he maintained an obstinate and persistent silence. Finally, I said, "Why did you shoot the man?" to which he replied, "Damfino." Repeating at intervals my question, he repeated his answer as monotonously as Poe's raven, and not another word could I get from him than "damfino."

"The trial begun, and ended in a verdict of guilty, in hardly more time than it has taken me to tell you of it. Then I rose to the occasion. I moved in arrest of judgment. The Judge did not know what that meant, but inferred that I had some objection to the hanging of my client, if client he could be called, and asked "What's the matter?" I took the law library there accessible, consisting of Archbold's Criminal Pleading and Practice, from the hands of the Attorney General and pointed out to the court that the allegation in the precedent from which the indictment was framed, that the gun was shot off and discharged, was not in the indictment, and I argued that the omission was a fatal defect, so that no judgment of the court could properly be based on the verdict of the jury. The Judge seemed staggered. He drew a long breath, took the book in his right hand and the indictment in his left, and compared them word by word, clause by clause, sentence by sentence, and finally, with another long breath, laid down the book and said, 'Well, it does seem, Mr. Tuley, that you have left out of this paper one statement that is in the form, but the court has heard the witnesses and is perfectly satisfied that the gun was shot off. I guess that will do. The objection is overruled, or the motion is denied, whatever may be the proper form of the order, to the entry of which the Attorney General will attend with more care than he bestowed on the writing of this paper.'

"Of course I was surprised, for I did not then know the value set upon human life in that country, but I did not yet abandon hope. I said, 'Your honor, I am newly arrived in this Territory, and have not had time nor opportunity to acquaint myself with the laws here in force, nor with the organization of your courts, but I suppose there is some way in which I can have the judgment of your honor in this court reviewed by a higher tribunal.' 'Oh, certainly,' he answered, 'there is a Supreme Court of the Territory composed of Judge Beaubien from the north, Judge Otero from the south, and

myself from the central parts of the Territory. I am at present the chief justice. It is your right to appeal to that court, but whether there shall be delay in carrying out the judgment of this court is within my discretion. That court will meet in Santa Fe on the first Monday of next December—this man will be hung on the third Friday of this present month of July.' Then I said, 'Your honor, under such circumstances an appeal seems hardly a practical remedy.' 'The court is with you in that,' said he. 'I think,' said I, 'that any preparation I might make for such an appeal would be labor in vain on my part.' 'The court is still with you,' the Judge courteously replied.

"I have never read in any history, sacred or profane, of any prophecy that met with such exact and literal fulfillment as did that prophecy of that Judge that that Texan would be hung on the third Friday of that month of July."



Another Veteran Gone.

JUDGE LOOMIS, of Parkersburg, whose death occurred since our last issue, was one of the best known members of the bar of the State, and a highly respected and beloved citizen of the community in which he lived.

His death depletes still further the ranks of the few remaining veterans of the bar who were the pioneers in the profession of West Virginia. They were a class of men who had a high ideal of the dignity and nobility of the legal profession; were well equipped for its practice; and were possessed of more than average ability.

Times have changed since they came on the scene; ideals have changed; and it is a source of regret, and a real loss to the bar, when one of these old veterans passes away. Judge Loomis had reached a ripe old age, and his death was not unexpected. The Bar Association will fittingly honor his memory.

Justice Versus Justice.

A VERY novel question has arisen before Judge Hugus of the Criminal Court of Ohio county.

The facts, in brief, are these: A. assaulted B. and voluntarily went before a Justice, confessed to the misdemeanor, and was fined by the Justice \$5 and costs, which he paid.

But B. afterward went before another Justice, swore out a warrant for A., upon which he was arrested and brought before the second Justice for trial. He pleaded his conviction for the offense charged in the warrant, but the second Justice ignored the plea and fined him a second time; whereupon A. appealed to the Criminal Court.

Judge Hugus sustained the judgment of the second Justice on the ground that the first Justice had no jurisdiction to try A. upon his voluntary appearance, nor until a warrant had been sworn out charging him with the assault, and A. had been arrested and tried under the warrant, unless the assault had been committed in his presence or that of an officer.

That is to say, if A. had not voluntarily appeared, and the assault had not been seen by the Justice or a Constable, and nobody had reported it or complained of it, then A. did not commit any offense of which a Justice had jurisdiction, however fully the breach of the peace might otherwise be established, even by the confession of the defendant.

It is unquestionably true that A. could not have been involuntarily brought before the Justice to answer for such an offense except upon a warrant, or unless it was committed in the presence of an officer.

But what is the purpose of a warrant except to compel legally the appearance of the accused? If he waives his right to the forms of law and voluntarily appears and the offense is

judicially established to the satisfaction of the Justice, what is lacking to make the judgment of the Justice valid? Or who is to complain of the judgment if the defendant does not? It is true that the Justice is bound to investigate the facts under such a proceeding as fully as under a warrant and give the injured party a right to be heard, but what figure would a warrant cut when the defendant was being thus tried, even if one had been issued? If the defendant is there the warrant or absence of a warrant does not enter into the question of guilt or innocence.

Moreover, what jurisdiction had the second Justice over the offense that the first Justice did not have? Did the second Justice sit as a court of appeals on the judgment of the first Justice? If the finding of the first Justice was duly certified to the second Justice and the identity of the charge was not questioned, why was not a plea of former conviction a bar to the proceeding under the second Justice from which the appeal was taken?

We do not mean to imply that a Justice can connive with an offender to shield him from the full penalty of the law or prevent an injured party from having a hearing; but we are not satisfied that the absence of a warrant and arrest—that is to say, a compulsory appearance of the defendant—in a criminal proceeding, is alone a cause for depriving a Justice of jurisdiction when the defendant is there, and not complaining of being there, but confessing his guilt.

We have not given the question any careful consideration, but would like to have the opinions of any who are disposed to discuss it.



A Dutchman on a witness stand was asked what ear-marks the pig had that was in dispute.

"Vel, dot pig he have no ear-marks, oexcept a very short tail," was the reply.

A Solomon of the Turkey Roost.

By Henry Burns Geer, Green Bag.

IT was a great day at Barney's Point—the day that Rube Wilkins brought suit before Squire Patton to replevin a hen turkey and her brood of half-grown turks.

Wilkins lived just across the road from Joshua Nelson, and he charged that the latter had alienated the birds from his kindly care and supervision, and had caused them to take up with his own fowls, to his (Wilkins) displeasure and financial loss; and further, that when he had remonstrated with his neighbor in a neighborly way, the latter had turned unto him a deaf ear, and had refused to deliver the turkeys over to him, their rightful owner. Therefore, he prayed the court for a replevin warrant, and an officer to execute it, that he might lawfully recover possession of his property.

The neighboring farmers were there for miles around, and the plow-shares rested quietly that day. The opposing counsel argued the case very learnedly, and the witnesses were most painstaking and explicit in their evidence. It was evident, long before the case was half over, that it would be a hard question for the Squire to decide. And, besides the legal aspect of the case, there was the political side too. How could Squire Patton afford to render a decision against either side, when the election was only about a month off, and both sides about equally strong in votes?

The evidence was all in finally, and the question up to the court for a decision. The Squire wore a self-satisfied look, as if he had reached a happy solution of the matter, that would be satisfactory to all concerned, as he arose and rapped for order. In a minute all was quiet,—men craning their necks eagerly forward to catch every word of the expected decision :

"The officers will now bring the turkeys into court," the Squire said gravely, and then he sat down, and leaned back in his seat, with his eyes closed.

A buzz of surprise ran around the room at this request, but it was quickly complied with, as the fowls had been cooped,—awaiting the decision of the matter.

Then the Squire rose quickly, and addressing a constable, said: "Release the turkeys in the road;" and then turning to the contestants and witnesses, he continued:

"The court reserves its decision until the turkeys, just released, go to roost, and, in the meantime, all the gentlemen present are invited to join the court, that we may observe the birds select their roosting place."

This announcement made the plaintiff and his friends smile. They construed it as a verdict in their favor; while the defendant looked uneasy.

But all turned out to watch the manoeuvres of the birds. They fed leisurely along down the road, and as it was getting late in the evening, they made upward glances with heads one-sided at every overhanging object they passed. Finally, they left the grass and took up a line of march straight down the road in the direction of Rube Wilkins' home,—the honorable court, and all interested, to the number of forty or fifty men, following gravely along at a safe distance behind, that they might not frighten the fowls.

On down the road they went, straight to Wilkins' back-lot bars, where they turned, went single file over to the horse-trough, drank with solemnity, then filed about to the barn shed, where the mother turkey said a few words to her young,—looking first with one eye, then with the other, up to some poles stretched across, where there used to be some hay, then deliberately flew up there and settled down for the night—followed by every blamed young turkey in her brood!

Squire Patton sprang up on a stump where he was in full view of both audiences,—the turkeys and the litigants with their friends,—and, clapping his hands for order, said:

"You gentlemen are all aware that 'chickens will come home to roost.' It is the belief of this court that turkeys will also come home to roost, and, therefore, the court decides this case in favor of the plaintiff."

A shout of approval mingled with exclamations of admiration greeted this decision.

The next day the Squire's opponent withdrew from the race.

The Confederate Horses and the Crops.

ONE of the most vivid traditions of the Civil War is that when Lee surrendered to Grant at Appomattox the latter said: "Let the men keep their horses; they will need them for the spring ploughing." Grant, in his own memoirs, writes that after Lee had accepted his terms, he, Grant, amended them by saying that as it was "doubtful whether they would be able to put in a crop without the aid of the horses that they were then riding," he would "let every man in the Confederate Army who claimed to own a horse or mule take the animal to his home." Lee remarked that this "would have a happy effect." In the Nicolay-Hay life of Lincoln, the suggestion as to the horses and the crops is attributed to Lee.

Col. Charles Marshall, who was aide to Lee at the meeting between the two Generals at the McLean residence, died recently at the age of 72, a respected citizen of Baltimore. He had been graduated from the University of Virginia in 1850 to become professor of mathematics in the Indiana University and then a lawyer in Baltimore again in 1853. He served throughout the war as a member of Gen. Lee's staff. In a lecture on the Appomattox episode, Col. Marshall described Lee as asking Grant to put his terms in writing. We quote from the *Baltimore American's* version of it:

"When Gen. Grant had written his letter in pencil he took it to Gen. Lee, who remained seated. Gen. Lee read the letter and called Gen. Grant's attention to the fact that he required the surrender of the cavalry as if they were public horses. He told Gen. Grant that Confederate cavalrymen owned their horses, and they would need them for planting a spring crop. Gen. Grant at once accepted the suggestion.

Evidently Grant regarded the idea as original with himself, and Col. Marshall regarded it as original with Lee. The probability is that each man had it in his mind independently of the other, and, it having been finally adopted, each looked upon himself as the author.—*Ex.*

The Reasons Why.

THERE ought to be no special reasons why a woman should not be allowed to practice law if she wants to, but there ought to be reasons why she should want to.

We know of none in either case. The one profession for which she is not adapted by nature is the law. The whole matter is cogently presented in this:

"There is no other profession like the practice of the law. It is a continual contest. The assertions from the minister in the pulpit are usually unquestioned and unanswered. His critics speak only in his absence. His hearers have assembled because they are in sympathy with his views, and expect to agree with what he may say. So with the work of the physician. His errors may neither be all buried nor forgotten, but he can rely upon the assurance that no one else will be employed to continually hunt for and expose them to public inspection. The teacher stands in advance of his pupils, teaching them things they have not yet learned. If, perchance, some leader of the class points out an erroneous statement, it may at once be corrected, with little embarrassment. But the propositions of a lawyer in court are made in the presence of a shrewd opponent, whose business it is to see the vulnerable places, point out the errors and inconsistencies and openly criticise the position assumed. His address to the jury is to be publicly answered and his conclusions refuted. He must be an antagonist because his client is. This is the life of the lawyer in court. It cannot be otherwise to win success. The nervous strain borne by the lawyer in a long, closely and often bitterly contested case demands not only mental but physical vigor which few men possess. At the end of such a contest, where, if not the life or liberty of one's client, his property, at least, is lost, the attorney must be strong indeed

who can, unperturbed, proceed with the demands made upon him by other pressing business. Are women so constituted that they can successfully live such a life? Is such a life desirable for a woman, where this strife and mental contest must be principally with men, even though she be strong, learned and experienced? Cannot a woman with such qualities utilize her life to better advantage elsewhere? Is there any crying need or pressing demand for women to practice in our courts? What great reforms, what betterment to society, would result from their assuming such onerous work?"



The Scimeter, of Memphis, tells of a young criminal lawyer of that city who on the occasion of his becoming of age began the celebration of his birthday in a way that caused his household a great deal of consternation

On the eve of the fete, shortly after midnight, the young man's family were suddenly startled from their slumbers by a loud voice in the house calling, "There's a man in the house! There's a man in the house!"

The valiant paterfamilias rushed from his room, bearing in his hands a heavy billet of firewood, to learn the cause of the disturbance and to capture the intruder. His son was standing in the hall, shouting at the top of his voice.

"Where's the man?" exclaimed the old gentleman.

"Here, sir; here!" proudly replied the young man. This is he. At last I'm twenty-one."



A lawyer, while bathing, was attacked by a shark. He managed to beat off his assailant and struggled back to shore. Once in safety on the beach he shook his fist at the retiring and disappointed shark, and gasped out: "You brute! That's the most abominable breach of professional etiquette I have ever known.—*Ex.*"

The Work of the Assassin.

FROM 1789 to 1902, there have been four attempts to assassinate the Presidents of the United States, as compared with ten attempts to assassinate the rulers of England (exclusive of four minor assaults); seventeen attempts to assassinate the rulers of France; ten attempts to assassinate the rulers of Russia. And since 1850, five attempts to assassinate the rulers of Germany (Prussia); six attempts to assassinate the rulers of Spain; four attempts to assassinate the rulers of Italy; and three attempts to assassinate the rulers of Austria. The list is without doubt incomplete. Moreover it does not include many plots and conspiracies which were discovered before consummation. The comparatively large number of recorded attempts in England and France may be due to the effort to suppress the publication of such events in some countries.

This comparison discloses this astounding result: Of the four attempts upon the lives of the Presidents, three have been successful, or 75 per cent.; of the ten attempts upon the lives of English rulers, none have been successful; of the seventeen attempts upon the lives of the rulers of France, only one has been successful, or about 6 per cent.; of the ten attempts upon the rulers of Russia but two have been successful, or 20 per cent.; and since 1850, of the five attempts upon the rulers of Germany (Prussia), none has been successful; of the four attempts upon the rulers of Italy, only one has been successful; and of the three attempts upon the rulers of Austria, but one has been successful.

Limiting this comparison to the attempts since 1860, we find three attempts upon the lives of the Presidents, as compared with two attempts upon the lives of the rulers of England; five attempts upon the lives of the rulers of France; eight attempts upon the lives of the rulers of Russia; three attempts upon the lives of the rulers of Germany; four attempts upon the lives of the rulers of Spain; three attempts upon the lives of the rulers of Italy; and two attempts upon the lives of the rulers of Austria. The comparatively small number of attempts in England during these years may be in part due to the

almost absolute seclusion of Queen Victoria after the death of Prince Albert.

This comparison gives the following result: Since 1860, all of the attempts upon the lives of the Presidents of the United States were successful; the two attempts upon the lives of English rulers were unsuccessful; of the five attempts upon the rulers of France, only one was successful; of the three attempts upon the rulers of Germany, none were successful; of the eight attempts upon the rulers of Russia, only one was successful; of the three attempts upon the rulers of Italy, only one was successful; of the four attempts upon the rulers of Spain, none was successful; and of the two attempts upon the rulers of Austria, but one was successful.



The Franchise in Virginia.

THE Virginia Constitutional Convention, which began its work nearly a year ago, completed it early in April, and adjourned to convene again on May 22, for the purpose either of proclaiming the new organic law or else of submitting it to popular vote. Its chief problem was solved on April 4 by its adoption of an article dealing with the suffrage question. The Virginia plan adopts a principle that several other States have put into force, known as the "understanding clause," as a temporary expedient for a short period,—that is to say, until January 1, 1904, local registrars may put on a permanent roll of voters all applicants otherwise qualified who are able either to read or to give a "reasonable" explanation of any section of the new constitution when read to them; this in addition to taxpayers and to old soldiers or their sons. That the general purpose of this clause is to give an opportunity for enrollment to white voters, while excluding illiterate negroes, is not denied by any one. Yet it does not follow, as many people assert, that there is anything radically unfair in this plan. Generally speaking, the illiterate white man possesses greater political capacity than the illiterate negro. The important part of a measure of this kind is not the temporary but the permanent method that it introduces. The permanent plan in Virginia is to be a yearly poll tax of \$1.50, besides which each applicant for registration must be

able to write his application clearly and without assistance in the presence of the registrar. Quite regardless of any favoritism that may be shown to the white voters, the Southern franchise laws render an excellent service to the negro race when they require from the negro voters either educational or property qualification, or both. The ballot is of no value whatever to the negro who is not fit to exercise it. The existence of reasonable qualifications as to literacy and property furnish excellent incentives to progress, valuable on all accounts and harmful on none. The best and wisest friends of the negro race are not worrying themselves at all about new Southern franchise laws. No Southern State has made provisions which exclude the negro of intelligence and property. The Virginia constitution provides for an improved educational system and advanced methods of control over railroads and other corporations. —*American Monthly Review of Reviews for May.*



All Men Created Equal.

THE declaration that "all men are created equal, and they are endowed by their creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness," has been a constant subject of disputation. It was a sentiment not new when inserted in the Declaration of Independence. A century and a half before Grotius, in his introduction to Dutch Jurisprudence, had said "through birth all men are equal." Montesquieu in his Spirit of Laws, said: "In republican governments, men are all equal: equal they are also in despotic governments; in the former because they are everything; in the latter because they are nothing."

When literally construed the clause that "all men are created equal," is in no sense true. I know no place where the inequalities of birth are so strongly contrasted as in Tucker on the Constitution, where he says, "Races of men differ widely. Men of the same race are unequal. In physique, we have giants and dwarfs—athletes and cripples—a Hercules and a hunchback; in mind, we have a Napoleon and a Louis—a Newton and an idiot; in morals, a Washington and an Arnold—a LaFayette and a Marat. In music, we find a genius for harmony, and another who cannot distinguish one air from

another; and so in poetry, art, science, philosophy and statesmanship."

If we say they are created equal before the law, it is true of the American citizen, but it was not recognized as true at that time of the colored race held in slavery. If we say it referred to equality of rights or to civil and political equality, it was true, but it was not applied to all men, for most of all the colonies had a class of people who were not recognized as having any civil or political rights.

Conway, in his introduction to the writings of Thomas Paine, says that at that time slavery existed in all the American colonies, and that in Pennsylvania there were not less than 6,000 slaves. In March, 1780, four years after the Declaration of Independence, Pennsylvania passed an act abolishing slavery, the first legislative measure of Negro emancipation in christendom.

If we speak of equality of rights, as Adams understood it to be under the English Constitution, it was true.

But Congress understood that England did not extend the rule beyond her own people, as we may see by a paragraph in the draft of the Declaration of Independence as originally presented by the committee to Congress, which reads :

"He has incited treasonable insurrections of our fellow-citizens with the allurements of forfeiture and confiscation of our property. He has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating and carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither. This piratical warfare, the opprobrium of infidel powers, is the warfare of the Christian King of Great Britain. Determined to keep open a market where men should be bought and sold, he has prostituted his negative for suppressing every legislative attempt to prohibit or restrain this execrable commerce. And that this assemblage of horrors might want no fact of distinguished die, he is now exciting those very people to rise in arms among us, and to purchase that liberty of which he had deprived them, by murdering the people on whom he also obtruded them; thus paying off former crimes committed against the liberties of one people, with crimes which he urges them to commit against the lives of another."

It will be observed that Jefferson did not contemplate the abolition

of slavery, for the paragraph only denounced the seizure of negroes in Africa, and transporting them to America to be sold into bondage, and left the domestic institution of slavery to continue as before.

But it is quite evident Congress did not mean to declare that the slave race were created equal with themselves, for it struck out of the Declaration the entire paragraph above quoted, and inserted in lieu thereof the single clause, has "Incited domestic insurrection among us."



A Remarkable Region of the South.

MR. ALFRED HOLT STONE, of Greenville, in Mississippi, in a very able paper on "The Negro in the Yazoo—Mississippi Delta," read before the American Economic Association at its last meeting at Washington, gives information and makes points of striking novelty and suggestiveness.

This region, the "blackest of the South's 'black belts,'" has been Mr. Stone's home for a lifetime, and he writes of it with an authority which commands the more respect because of the judicial temperance of his paper.

The so-called Yazoo-Mississippi delta lies in the State of Mississippi between the 32d and 35th parallels of north latitude and the two rivers from which it takes its name, a region of about one hundred and fifty miles in length and about fifty miles in its greatest width. It has been described as "the cream jug of the continent." "Nature knows not how to compound a richer soil." Its area is about three and one-quarter million acres, and its population about two hundred thousand, of whom there are more than seven times as many blacks as whites. In one of the nine Mississippi counties wholly within this region, Issaquena, the number of blacks proportionately to the whites is the greatest anywhere in the United States, or 15.5 to 1. Less than 4 per cent. of whites of the State are in this delta, while nearly 19 per cent. of the negroes are here gathered.

In this "blackest of the South's 'black belts,'" however, Mr. Stone tells us, "we hear nothing about an ignorant mass of negroes dragging down the white man; we hear of no black incubus; we have

few midnight assassinations and fewer lynchings." The violation of a white woman by a negro is "an unknown crime;" yet "nowhere else is the line marking the social separation of the two races more rigidly drawn." "We have but one negro problem—though that constantly confronts us—how to secure more negroes."

Now to what is this happy social condition due? Mr. Stone ascribes it to the absence in that region of a "white laboring class which comes in contact with the same negro class." "The capital, the devising brain, the directing will, constitute the white man's part, the work itself is the negro's." The plantations, owned and controlled by white men, are large, or from five hundred to several thousand acres, and most of them are growing larger: "Here the era of the small farm has not set in." When there are changes of ownership the property is bought entire. White artisans and white men who do any work with their hands are very few.

Now, the old maxim that familiarity breeds contempt is especially applicable to the negro in his relations with the whites, Mr. Stone contends. "Their ingrained admiration for wealth and station, strong as it is," he says in explanation, "is no more controlling a mental habit than is their lack of respect for the opposite conditions." Work, in the estimation of the negro, is reserved to his race as its natural portion; he despises the white man who engages in it. Respect for the white race because it is white, engendered by slavery, is weakened, if not destroyed, when black and white labor side by side.

In the delta the relation which prevailed under slavery has changed only so far that "out of it has been evolved that of patron and retainer." The white man is still dominant and masterful, the employer never the worker. Accordingly, even on plantations where the negroes are one hundred to one white man, "the thought of the possibility of rape never comes." No white man or woman is in fear of violence at the hands of negroes. In all this region, Mr. Stone says, there is not a single plantation where negroes or white men attempting violence would not be fought by some of the negro retainers. And this is because here there is no "contact on a common industrial plane."

This is a very striking point, and it deserves grave consideration.

Cecil Rhodes the Man.

CECIL RHODES in personal appearance gave the impression that he was taller than, in fact, he was. There was a certain leonine majesty about him which bespoke a man born to command. In his dress he was unconventional to an extreme. No one cared less for pomp. The King of the Diamond Mines, he never deigned to bedeck himself with a brilliant. His hair, which became gray after the raid, was as often touselled as smooth. He was always smoothly shaven. He had a somewhat rubicund visage, a steely blue-gray eye, the jaw of William the Conqueror, and the brow of a poet. No one was more given to meditation than he. For love of nature and constant communion with stars and sky and flowers and trees, he might have been the twin brother of Wordsworth. Even in death he decreed that he should be buried in the midst of mountains commanding scenery so sublime that he named it "the view of the world." Mr. Herbert Baker, who knew him well, says: "The ennobling influence of natural scenery was present in his mind in connection with every site he chose and every building he contemplated."



After hearing evidence in an assault case between man and wife, in which the wife had had a deal of provocation, the magistrate turning to the husband, remarked: "My good man, I really cannot do anything in this case."

"But she has cut a piece of my ear off, sir."

"Well," said the magistrate, "I will bind her over to keep the peace."

"You can't," shouted the husband; "she's thrown it away."



Magistrate (to prisoner): "Have you any visible means of support?"
 Prisoner: "Yes, sir, your honor." (To his wife, a laundress): "Bridget, stand up, so that the court kin see yez."—*Tid-Bits*.

We have it on the authority of *The Lyre* that the following is a "true copy" of an Irish will: "In the name of God, amen! I, Timothy Delons of Barrydownderry, in the county of Clare, farmer; being sick and wake in my legs, but of sound head and warm heart; Glory be to God!—do make the first and last will, the ould and new testament; first, I give my soul to God when it pleases him to take it; sure, no thanks to me, for I can't help it then; and my body buried in the ground at Barrydownderry chapel, where all my kith and kin have gone before me, an' those that live after, belonging to me, are buried, pace to their ashes, and may the sod rest lightly over their head.

"Bury me near my grandfather, Felix O'Flaherty, betwixt and between him and my father and mother, who lie separate altogether, at the other side of the chapel yard. I lave the bit of ground—10 acres—rale old Irish acres, to me eldest son, Tim, after the death of his mother, if she survives him. My daughter, Mary, and her husband, Paddy O'Ragan, are to get the white pig. Teddy, my second boy, that was killed in the war of Amerikay, might have had his pick of the poultry, but as he is gone I'll lave them to his wife, who died a wake before him; I bequeath to all mankind fresh air of heaven, all the fishes of the sea they can take, and all the birds of the air they can shoot; I lave to them the sun, moon and stars. I lave to Peter Rafferty a pint of ful-poteen I can't finish, and may God be merciful to him!"



The star boarder, who was reading his paper at breakfast, suddenly gave a low shriek and fell to the floor. Kind hands lifted him to a couch, and somebody went for a doctor. The more curious among those present picked up the paper, and saw what had shocked him. It was an item reading:

"California will ship 60,000,000 pounds of prunes to the Eastern market this year."—*Baltimore American*.

WEST VIRGINIA COURT OF APPEALS,

Decisions Handed Down at the Last
Term.

REPORTED SPECIALLY FOR THE READERS OF THE BAR.

Appearing Here For the First Time in
Print.

Maxwells vs Cunninghams.

McWhorter, J.

From Ritchie County.

Affirmed.

Syllabus.

1. When the jury in an action of ejectment has been instructed distinctly and fully upon the doctrine that the plaintiff must recover on the strength of his own title and cannot be aided by the weakness of the title of his adversary, it is unnecessary to again give such instruction in connection with an instruction asked by plaintiff expounding the law as to what is necessary to be shown by a defendant who relies on adverse possession of land under color or claim of title to defeat the legal title of the plaintiff.

2. One claiming title as against the legal owner is bound to show his color or claim of title, and that it covers the land or part of the land in controversy; that he entered under said color or claim of title upon the said land or some part of it; that his entry was hostile and adverse to the party having the legal title, and was actual, visible, exclusive and unbroken under said color or claim of title for ten years before the commencement of the action against him.

3. One so holding adversely under *claim* of title for ten years before the commencement of the action will be limited in his adverse holding to his actual enclosures, if under *color* of title the adverse holding will extend to the boundaries contained in the deed or writing constituting his color of title.

4. Or, when one has entered and held under another before his

possession can become adverse there must be an express disclaimer or its equivalent and the assertion of an adverse title with notice to the owner.

5. An owner of several tracts of land lying contiguous to each other should have them entered and charged with taxes on the land book as a whole and not in different parcels.

6. If the defendant in an action of ejectment relies upon setting up an outstanding title for the purpose of defeating the action, whether in the State by forfeiture or otherwise, must affirmatively and clearly establish such title as an actual and subsisting and better title than the plaintiff's title—such title as would enable the third party himself to maintain an action for the possession of the lands in controversy against both the plaintiff and defendant.

Seller vs Union Manufacturing Co.

McWhorter, J.

From Tucker County.

Reversed and remanded.

Syllabus.

1. Syl. 2 and 4, *Manion vs Fahy*, 11 W. Va., 482, and Syl. 1, *Morris vs Peyton*, 29 W. Va., 201, reaffirmed.

2. The parties to a suit can adjust matters and their rights between themselves and have a decree entered by consent of all parties without regard to the state of the pleadings or evidence in the cause, and the court at a subsequent term has no power to set aside, alter or modify it without the consent of the parties except only to correct a clerical error.

3. The court in its decrees carrying into execution a consent decree may construe the same when necessary, but it cannot set aside such consent decree and enter one totally different therefrom under the guise of construing it.

4. The stockholders and creditors of an insolvent corporation other than a creditor by trust lien covering all the real estate of said corporation procured the appointment of a special receiver of the property of said corporation. Held: That the said trust lien will be protected against indebtedness created by said special receiver.

Lenhart vs Zents and others.

McWhorter, J.

From Preston County.

Affirmed.

Syllabus.

L conveyed to Z 50 acres of land and reserved his vendors' lien thereon for \$850 of the purchase money. L removed to the State of Missouri, leaving the purchase notes with C, his father-in-law, to receive the money as the notes fell due to be sent to L. Z, without placing his deed on record, executed a general assignment to W, trustee, on all his property, including the 50 acres, to secure his creditors, naming them and the amounts of their debts respectively, but not mentioning L or the purchase money due him on the land.

W, the trustee, advertised the property for sale under the trust deed, including the "legal and equitable interest" of Z in said 50 acres described in said advertisement as "conveyed to said Zents by W. L. Lenhart and wife by deed dated May 20th, 1893, retaining a lien for the deferred purchase money due thereon." The 50 acres was purchased at the sale by F, O being present at the sale. W filed his bill invoking the assistance of the court to distribute the proceeds of the trust sale, making the creditors of Z, except L, parties defendant. The cause was referred to a commissioner to ascertain and report the true amount due to each of the creditors of Z mentioned in the deed of trust, also the amount of the debts of any other creditors of Z. W procured from C the possession of the purchase notes left by L for the purpose of getting data for a settlement as trustee, and without authority therefor laid them before the commissioner, claiming that he was attorney for L, and proved them as a general debt against Z. They were so allowed by the commissioner without the knowledge or consent of L or of C and the report of commissioner was confirmed, of which neither L nor C had knowledge or notice. L brought suit to enforce his vendors' lien against the 50 acres of land. Held: He was entitled to so enforce it.

Robinson vs Lowe.
McWhorter, J.
From Wetzel County.
Reversed and new trial granted.
Syllabus.

1. A copy of a grant from the Commonwealth of Virginia certified as follows:

"Land Office, Richmond.

"The foregoing is a true copy from the Records.

"Given under my hand and seal of office this 14th day of September, 1881.

[Seal]

"J. M. Brockenbrough,

"Reg. Land Office."

is sufficiently attested under Ch. 130, Code, to be admitted in evidence in the trial of an action of ejectment.

2. So also a copy of a deed from the record of the clerk's office of the county court of Wetzel county, West Virginia, attested as follows: "A copy. Teste: H. R. Thompson, Clerk," is sufficiently attested to be so admitted in evidence in such action under said chapter.

3. A deed executed by an attorney in fact, purporting to convey real estate with general warranty, under a power of attorney authorizing only a quit claim deed has the effect to quit claim on the part of the principal although he is not bound by the warranty.

4. Syl. 6, Wilson vs Braden, 48 W. Va., 36 S. E. 367, approved.

5. An instruction which singles out certain facts and makes the case turn on them, ignoring other material facts in the case, is erroneous. Price vs Railroad Co., 46 W. Va., 538.

6. A deed or writing which purports to convey described land and

pass a title, gives color of title, no matter in what its invalidity may consist.

7. Mere color of title is valuable only so far as it indicates the extent of the claim under it.

Creed Collins and Jacob Daugherty vs W. H. Sherwood.

Poffenbarger, J.

From Ritchie County.

Reversed and remanded.

Syllabus.

1. In a suit for partition of land, brought by one claiming under an invalid tax deed, the defendant may allege in his answer, as new matter, constituting a claim for affirmative relief, the defects in said tax sale and deed, and ask that the same be set aside, and such relief may be granted in such suit.

2. The curative provisions of Section 25 of Chapter 31 of the Code are not retroactive in their operation, and, therefore, they only apply to tax sales made after they were passed.

3. Section 7, Chapter 31, Code of 1868, provided that if the taxes, interest, damages and commissions on delinquent lands certified to the Sheriff for sale, were not paid previous to the day fixed by law for the sale of the land, "the said Sheriff or collector shall proceed to make sale accordingly; and if the same be not completed on the first day, it shall be continued from day to day (Sundays excepted), between the hours aforesaid until it shall be completed." The Sheriff of Ritchie county began his sale of such lands December 2nd, 1871, and then adjourned until January 9th, 1872, made no sales between said dates, and completed his sales on said last named date. Held: The adjournment was unauthorized and invalidates the sale and a deed made in pursuance thereof, it being such an irregularity appearing of record as was calculated to materially prejudice the rights of the owners.

4. In 1871 H L & R jointly purchased a tract of land at a tax sale, and a deed was made to him in pursuance thereof. H paid none of the purchase money, and L & R permitted the land to be returned delinquent and sold again for the taxes for a subsequent year, and purchased it. For another year, still later, the land was again sold and purchased by the State. The land was assessed in the names of H L & R until 1880, when it was entered on the land books and assessed in the names of persons claiming under L & R, and continued to be so assessed down to and including the year 1897, and the taxes were paid by persons so claiming. Held: By Section 3 of Article 13, Constitution, the title is vested in the persons claiming through and under L & R.

5. When the holder of an invalid tax deed and those under whom he claims have paid no purchase money, taxes or costs under or in procuring the same, the person entitled to have the deed set aside need not tender or pay him anything, or offer to do so, in attacking such deed.

Klapneck & White vs Henry Keltz, &c.

Dent, J.

From Marshall County.

Reversed.

Syllabus.

1. A motion to set aside a decree confirming a sale should show errors therein to the prejudice of the party complaining as against purchasers who are strangers to the suit and in no wise interested in the result thereof.

2. The reversal of a decree of sale ever so erroneous cannot effect the title of purchasers at a judicial sale, strangers to the suit.

3. It is not the advertising nor bids, private or public, that make a sale judicial. The decree of confirmation alone gives it character as such and places it beyond attack for errors or irregularities which might have been taken advantage of prior to such decree.

McConaughey & Co., Appellants,

vs

Bennett's Executors, Appellees.

Poffenbarger, J.

From Gilmer County.

Affirmed in part, reversed in part, and remanded.

1. When a co-plaintiff, being a necessary party, in a chancery cause, declined to prosecute further as plaintiff, and moves the court to dismiss the cause as to him, the court should, upon motion of the other plaintiffs, transpose him to the other side of the cause and allow it to be prosecuted against him as a defendant.

2. When a judge of a circuit court is interested in a case, which, but for such interest, would be proper for the jurisdiction of his court, the action or suit may be brought in any county in an adjoining circuit, the county-seat of which county is nearest the county seat of the county wherein said judge resides, and, in such case, the suit may be brought and prosecuted in such adjoining county if none of the parties reside therein.

3. May an action of ejectment or unlawful detainer, under such conditions, be brought in such adjoining county?

4. A covenant of warranty is inseparable from the land with respect to which it is made, and passes to the vendee of the covenant as incident to the land, and not as an assignment, separate and distinct from the conveyance.

5. After breach of such covenant, it can no longer run with the land, nor has any existence or virtue, save for the purpose of supporting a right of action for damages on the part of him who held it at the time of the breach against the covenantor.

6. If, at the time a covenant with general warranty is made, the land conveyed is actually in the possession of a third party holding the same under a paramount title, there is an eviction *eo instanti*, and a right of action accrues at once to the covenantee.

7. Such claim for damages may be assigned in whole or in part.

8. If the assignee takes the entire claim, in such case, his remedy

is by an action of covenant, and he has an adequate remedy at law, and cannot sue therefor in a court of equity.

9. But, in such case, if only a part of the claim be assigned, the assignee has no remedy in a court of law, and must seek his recovery thereon in a court of equity, although the relief he asks is merely pecuniary.

Dent vs Pickens.

Poffenbarger, J.

From Barbour County.

Reversed and remanded.

Syllabus.

1. When a suit in equity is brought for the purpose of setting aside a fraudulent deed of trust on land, charged by will, probated before the time of the execution of such deed, with payment of a sum of money to the testator's estate, and the bill does not allege payment of the money so charged upon the land, and is dismissed at the hearing in the court below, and the decree is reversed on appeal and the cause remanded, and no notice is taken in the opinion or decree in the Appellate Court of the lien created by the will, the question of the satisfaction of such lien is not *res adjudicata*.

2. In a suit brought to set aside a fraudulent charge upon real estate when there are valid liens on the land prior to that of the plaintiff in such suit, and the money secured by them is due and payable, the court should ascertain the amounts and priorities of such liens, and decree the land to be sold to satisfy said liens as well as that of the plaintiff.

3. In such case it is reversible error to decree a sale of the land subject to prior liens.

W. W. Bowman vs Dewing & Sons.

Dent, J.

From Randolph County.

Affirmed.

Syllabus.

1. On demurrer to evidence the rule in this State, as in Virginia, is to certify and consider the whole evidence as though on motion to set aside a verdict in favor of the demurree.

2. A sale made in 1843 of a tract of land under a forfeited title which does not include or cover such land is void, and a deed made by virtue thereof is also void and can vest no title in the purchaser and those claiming under him except such title as may be in the state at the date of such deed.

3. Section 3, Acts 1841-2, vests any forfeited title to a tract of land in any person having just title and claim to such land, legal or equitable, claimed, held, or derived from or under any grant of the commonwealth, bearing date previous to the first day of January, 1843, who shall have discharged all taxes duly assessed and charged against him upon such lands, and all taxes that ought to have been assessed or charged thereon from the time that he acquired title thereto, whether legal or equitable.

B. W. Foley vs F. J. Ruley et als.**Poffenbarger, J.****From Doddridge County.****Reversed and remanded.****Syllabus.**

1. A creditor who, after his debtor has made a fraudulent or voluntary conveyance of his real estate, but before any other creditor files a bill in equity to set aside such conveyance, obtains a judgment in a court of law against such debtor, has a lien by virtue of his judgment upon the real estate so conveyed from the date of the judgment superior and prior to that of the creditor assailing the deed.

2. When all the creditors, assailing a fraudulent or voluntary conveyance, are judgment creditors, the lien of each dates from the time he obtained his judgment, and not from the date of the filing of his bill, answer or petition attacking the fraudulent or voluntary conveyance, and the priorities among them must be settled according to the dates of their judgments.

3. A creditor at large is not entitled to priority over one who has obtained a judgment against the debtor subsequent to the date of the fraudulent conveyance, but before the filing of the bill by such creditor at large to set it aside, although he is entitled to priority over one who obtains his judgment after the filing of such bill.

A. F. Rohrbough vs The United States Express Co.**Poffenbarger, J.****From Barbour County.****Reversed and judgment for defendant.****Syllabus.**

1. In reviewing a judgment in a case tried by the court in lieu of a jury, the Appellate Court treats it as a case standing on a demurrer to the evidence.

2. When an agent is commissioned to do any act, nothing being said as to the mode of performance, he has an implied power to perform his duties in accordance with any recognized usage or mode of dealing.

3. An agent has no power to delegate his agency to another, or to sublet it; but he may employ clerks, whose acts, if done in his name and recognized by him, either specially or according to his usual mode of dealing with them, will be regarded as his acts, and as such binding on the principal.

4. The powers of an agent are to be exercised for the benefit of his principal only, and when he acts otherwise, with the knowledge and participation of the person relying upon his unauthorized act, his principal is not bound by such act.

5. Where an agent of an express company entrusts to another in the office with him, but not in the employ of the express company, the transaction of its business, under his supervision and control, and without the knowledge of the company, and such employe of the agent goes out and solicits deposits of money with him in exchange

for money orders of the company, and so receives money and issues such orders, without requiring payment of the usual fees or charges upon such orders, and absconds with the money, the person making such deposits does it knowing such issue of orders is beyond the powers of the agent for whom such employe professes to act, and he cannot recover from the company on the orders.

6. If an agent disregards specific instructions as to the mode of executing his powers, in respect to a matter as to which he is held out to the public by his principal as having full power and authority, his acts are, nevertheless, binding upon his principal as regards third parties having no notice of such instructions.

Ernest W. Koelz vs George.
Poffenbarger, J.
From Taylor County.
Reversed and remanded.
Syllabus.

1. In the settlement of the accounts of a solvent co-partnership, on dissolution, the commissioner, before undertaking to ascertain the net assets and profits and distribute the same, should find the true state of the accounts between the firm and each of its members, as separate and distinct settlements, after which sums due the firm from its individual members, however incurred, are to be treated as assets, and sums due from the firm to its members as liabilities.

2. In such case, having so settled the accounts between the firm and its members, the net assets should then be ascertained by deducting from the total assets the total liabilities, after which the total capital contributed by the members of the firm should be deducted and the remainder divided as profits, according to the agreement of the parties.

3. In ascertaining the state of the accounts between the partners, where the firm is composed of but two members, and one has taken all the assets and assumed the payment of all the debts, each should be credited with what the firm owes him, if anything, with what he has assumed to pay for the firm, if anything, with his capital contributed and with his share of the profits, and then charged with what he owes the firm, if anything, and with whatever assets of the firm he has taken by the dissolution agreement, if any. The balance then struck will show what is due to and from the co-partners respectively.

Atkinson vs Plum.
Brannon, P.
From Wood County.
Decree affirmed.
Syllabus.

1. Where one releases a deed of trust and takes a new deed of trust for a balance of his debt, a lienor subsequent to the first deed of trust thus gets preference over the second deed of trust, and equity

will not cancel the release against such second lienor, except for fraud or mistake.

2. To create an estoppel by consent there must be some conduct of the party amounting to a representation or concealment of material facts.

3. To create an estoppel by conduct the representation must be made with the intention, actual or fairly to be inferred by the other party that such other party should act upon it, or such representation should be so grossly negligent as to mislead another to his injury, and thus amount to fraud constructively.

4. The doctrine of estoppel by conduct always presupposes error on one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage.

5. It is essential to an estoppel by conduct that the party claiming to have been influenced by the conduct of another should not only be destitute of information as to the matter to which such conduct relates, but also without convenient and available means of acquiring such information.

6. To authorize equity to cancel a writing on the ground of mistake, based on mistaken belief of a party, that belief must be a fair and reasonable one justified by facts adequate to inspire it.

Sampson Harbert, Plaintiff below, Defendant in Error,

vs

Monongahela River Railroad, Defendant below, Plaintiff in Error.

Poffenbarger, J.

From Harrison County.

Reversed and remanded.

Syllabus.

Where a party, against whom a judgment was rendered by a justice of the peace, on the verdict of a jury, obtained a writ of *certiorari* and removed the same into the circuit court to be reversed, being the decision of the case of *Richmond v. Henderson*, 48 W. Va., 37 S. E., 653, and said judgment was affirmed by the circuit court and a writ of error awarded by this court, before said decision of *Richmond v. Henderson*, and the plaintiff in error has asked that said *certiorari* be treated as an appeal, the judgment of the circuit court should be reversed and the case remanded with directions to treat it as being in said circuit court on appeal and proceed with it accordingly.

Sample vs Consolidated Light and Railway Co.

McWhorter, J.

From Cabell County.

Affirmed.

Syllabus.

1. A declaration by the motorman running on an electric car made while the car was still on the body of one it had run down, that "I saw the child, but thought I could pass it," or, "This is a

terrible thing; I saw the child, but thought I could run past it," is admissible in evidence as a part of the *res gestæ* in an action for the injury.

2. A motorman in charge of an electric car moving in the public street, where he has reason to expect little children are playing, must exercise a high degree of watchfulness in the operation of the car.

The Horner Gaylord Company, Appellant,

vs

W. C. Faucett and others, Appellees.

From Harrison County.

Affirmed.

Syllabus.

1. A deed of trust executed in good faith to secure a *bonæ fide* debt on a stock of goods and extending to cover after-acquired property, duly recorded, is not fraudulent *per se* or *prime facie* fraudulent as to subsequent creditors with notice in equity.

2. A subsequent execution creditor has a plain adequate remedy at law as to such after-acquired property, but equity will afford him no relief, as such deed as to such property is void at law, but will be sustained in equity.



M. D., of Boston, a devotee of the wheel, was not long ago visiting in one of the small towns of western Massachusetts. He was taking a spin about the streets shortly after his arrival, when he was run down, as he afterwards declared, by a negro and knocked off his bicycle. The fall not only ruined his clothes, but broke his skin and wheel.

These combined injuries made a breach in his placidity, and he picked up a stone and threw it with accurate aim at the colored man and brother. This infraction of the peace resulted in his arrest and in his conviction in the local court of justice.

"I fine you five dollars," said the judge. "Have you anything to say?"

"Nothing," replied D., unmollified, "except that I wished I had killed the fellow."

"That remark will cost you five dollars more," remarked his honor.

D's temper was not improved by this fresh dispensation of justice, wherefore the bitterness of his rejoinder was plainly apparent.

"Conversation seems to come high in this court," he observed.

"Five dollars for contempt," promptly responded the bench. "Have you anything more to say?"

"I think not," answered the defendant. "You have the advantage of me in repartee."

Payment of the fines closed the case.

When Lincoln and Beecher Prayed Together.

(By Samuel Scoville, Jr., Beecher's Grandson.)

In the life and character of Abraham Lincoln there are so many striking characteristics that it is easy to overlook the hidden and deeper part of his life, even as in looking at his face we note the humorous mouth which smiled so often and laughed so seldom, and overlook the sadness of those deep-set patient eyes. So, too, in the glory of his achievements is forgotten the pathos of the lone figure which guided this country in her time of need through deep waters into a safe harbor. On him was heaped all the blood and tears and toll and agony of those terrible war years, of which this generation knows only by hearsay. It is perhaps impossible to realize what Lincoln must have suffered as the embodiment of the nation during her sorrow and travail. One anecdote which is not generally known perhaps illustrates the source of the power of his nature better than almost any other.

During the year 1862, the hopes of the North were at their lowest ebb. It was in that year that the second battle of Bull Run had been fought and lost, McClellan was entrenched before Richmond, and the strength and resources of the nation seemed to have been fruitlessly wasted. Henry Ward Beecher was then in Brooklyn, and was perhaps more prominently associated with the cause of the North at that time than any other minister of the gospel. He had preached and lectured and fought its battles in pulpit and press all over the country, had ransomed slaves from his pulpit, and his convictions and feelings were everywhere known.

Late one evening a stranger called at his home and asked to see him. Mr. Beecher was working alone in his study, as was his usual custom, and this stranger refused to send up his name, and came muffled in a military cloak which completely hid his face. Mrs. Beecher's suspicions were aroused, and she was very unwilling that he should have the interview which he requested, especially as Mr. Beecher's life had been frequently threatened by sympathizers with the South. The latter, however, insisted that his visitor be shown up. Accordingly the stranger entered, the doors were shut, and for

hours the wife below could hear their voices and their footsteps as they paced back and forth. Finally, toward midnight, the mysterious visitor went out, still muffled in his cloak, so that it was impossible to gain any idea of his features.

The years went by, the war was finished, the President had suffered martyrdom at his post, and it was not until shortly before Mr. Beecher's death, over twenty years later, that it was known that the mysterious stranger who had called on the stormy winter night was Abraham Lincoln. The stress and strain of those days and nights of struggle, with all the responsibilities and sorrows of a nation fighting for its life thrust upon him, had broken down his strength, and for a time undermined even his courage. He had traveled alone in disguise and at night from Washington to Brooklyn to gain the sympathy and help of one whom he knew as a man of God, engaged in the same great battle in which he was the leader. Alone for hours that night the two had wrestled together in prayer with the God of battles and the Watcher over the right, until they had received the help which He had promised to those who seek his aid. Whatever were the convictions and religious belief of Abraham Lincoln, there is no doubt that he believed in prayer, and made that the source of his strength.—*The Outlook*.



In 1858, during the Senatorial campaign in Illinois, when Abraham Lincoln was canvassing the western part of the State, he made a speech at Rushville, in Schuyler county, which was reported by a young lady who wrote occasionally for the local paper, the *Schuyler Citizen*. As an introduction to her report of the speech, which appeared in the next number of that journal, she said:

"So many people had told me that Mr. Lincoln was a miracle of homeliness, that I expected to see the ugliest man in Illinois. Instead of that, I saw a man whose face lit up in a most extraordinary way when he talked, and I don't care what anybody else's opinion is, I want to say that I consider Mr. Lincoln one of the handsomest men I ever saw."

A copy of the paper with this paragraph carefully marked was sent to Mr. Lincoln. He took it at once to his wife. "Mary," he said, "I have always thought until now that you were the only woman on earth who considered me a handsome man, and I have not been absolutely certain about that, but it seems there is one other."

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WE are under obligations for recent favors to Circuit Clerks W. H. Wilson of Elkins, W. K. Pritt of Parsons, B. C. Conrad of Parsons, and to Attorneys Chas. P. Swint of Weston and H. M. Simms of Huntington.



HEARING it said that because he was born in Scotland, Speaker Henderson could never be President of the United States, even if all the people voted for him, a person, supposed to be well informed, asked in good faith what the American people had against the Scotch that they could make such a law as that.



THE report for the year of the Steel Trust shows that that trust produced twice as much steel as Great Britain, and six times as much as France. The products of the year are worth \$459,090,938. Orders are booked for nearly a year ahead. This is the largest trust on earth. To show the relation of the company to the country, the average number of men employed was 158,263; and the total paid for railroad freight, \$24,147,567; the average yearly wages paid to each man is about \$2 per working day, and the net profits amounted to \$116,000,000. The cost value of production was \$343,000,000. This would show net profits of \$116,000,000; but from this amount must be deducted "the cost of maintenance." "The cost of maintenance," \$24,541,689, is made up of repairs, maintenance, and extraordinary renewals, distributed respectively among the steel-making, coke-making, and transportation properties, nearly twenty millions being in the steel-making. Of the total amount of these vast profits J. P. Morgan & Co., as managers of the syndicate, will receive one fifth.

Death of U. S. G. Pitzer.

THE death of U. S. G. Pitzer, of the Martinsburg bar, was learned with sad surprise by all who knew him. He was in the vigor of young manhood, with a promise of many years of life, and had already attained a standing in his profession that gave assurance of eminence at the bar.

At the last meeting of the State Bar Association his rugged form and splendid condition of health made him a conspicuous figure in that assemblage, and he would have been the last person, from a human standpoint, who would have been selected as an early subject for the "grim reaper's" purposes. But "the young die; and hearts that are dry as summer's sand burn to the socket." In the economy of nature the limitations of this life are so effectually hid from human foresight as to be above and beyond all human speculation. They are not to be determined by age or youth, sickness or health, debility or vigor, or any of the phases of external appearances by which one man is accustomed to judge his neighbor. The aged and the invalid totter on through tedious years, while the vigorous youth are dropping out of the ranks with startling frequency. It may be said that it is not health or natural vigor that determines our lease of life, but unremitting respect of the laws of health. And yet, as in the case of our Brother Pitzer, insidious disease may circumvent and surprise the most assiduous watchfulness and care.

Mr. Pitzer was not only physically but mentally equipped for a strenuous pursuit of the demands of his profession. He was graduated from the Law Department of the State University some years ago, and has since been a diligent student and an industrious worker in the active affairs of public and private life. He will be missed by his immediate colleagues, and his death is a loss to the bar of the State.

A New Deal.

AT the last meeting of the State Bar Association two new measures were adopted which are of interest to members of the Association and all readers of THE BAR, of which some may not yet be advised.

The first of these relates to the annual dues. In order to relieve the labor and inconvenience of making two separate collections during the year—the one for THE BAR and the other for the annual dues—the annual dues was fixed at \$4 per annum instead of \$3, which will include the subscription price of THE BAR. The Treasurer will hereafter make one draft for both—that is, he will draw for \$4, under the head of dues, and this will entitle each member of the Association to THE BAR free of charge.

As nearly all the members were subscribers to THE BAR, and it was assumed that all would be willing to be, and indeed could not afford not to be if they desired to have the benefits of membership and to keep in touch with the Association and the profession in the State, it seemed to be a useless expense of time and money to be collecting the two amounts in two independent bills. It imposed a very heavy and unpalatable burden on the Executive Council, who get no compensation for this labor, to collect the subscription bills of THE BAR from all over the State by correspondence.

Four dollars is a less sum than is charged as dues by many State Associations without any collateral benefits. Our Association will throw in THE BAR, which costs more than one dollar a year to publish, to say nothing of the gratuitous labor expended upon it.

The full text of the amended Constitution regulating this matter is as follows:

The fee for admission to membership shall be \$5, which

shall in all cases accompany the application for membership. The annual dues shall be \$4, the payment of which shall entitle each member to receive one copy of the journal and all the regular publications of the Association free of charge. The Treasurer shall annually set apart and pay over to the Executive Council one-fourth of the sum collected as annual dues, which shall be used as a fund for paying the expenses of publishing the journal of the Association.

The other measure adopted by the Association was that hereafter THE BAR be published in ten instead of twelve numbers per year. This is the plan of some of the leading law journals of the country, including the *American Law Review*, which is perhaps the first journal in the United States. The June and July numbers and the August and September numbers are consolidated. They will be larger than the other numbers, and the amount of matter for the year will thus be about the same as if twelve numbers were issued. During July and August the lawyer, as a rule, is off on a vacation, or is indulging in a volume of fiction in preference to law literature, and will not miss the hot weather edition of his law journal.

The next number of THE BAR will, under this plan, reach its patrons about the first of September prox.



THE average lawyer is just about this time having irrepressible visions of angling in mountain streams, amid the fresh foliage of the forest, with singing birds overhead and assured isolation from intruding clients.



IN Michigan they assess a dog one dollar for being a dog. In Tennessee they assess a man fifty cents for being a doctor. It costs half a dollar more to be a dog in Michigan than a doctor in Tennessee.

The Monster of the Highway.

ANY one who follows the course of events as detailed in the daily press has not failed to be impressed with the following which the coming of the automobile suggests.

There is no doubt but that this little monster on our public highways is going to make a fight for its existence and a right of way on every public thoroughfare. But at the same time it will be recognized as a menace to the life and limbs of everybody and everything that ventures upon the highway. We copy from an exchange the following as a sample incident of the everyday news, which only needs to be varied in its details to be the common incident of every paper we read:

"Dr. Clifford Colgate Moore, retired physician, and his wife are confined to their home on North Broadway, both suffering from injuries as a result of a runaway accident caused by three operators of an automobile. Dr. Moore and his wife, who was a daughter of the well known circus proprietor named Nathan, who left \$1,000,000, went out for a drive behind one of the doctor's fast trotters. When near the residence of William H. Albro, Dr. Moore saw a red automobile with three men in it coming directly toward his carriage at great speed.

They paid no attention to him and he turned his horse to one side just in time to avoid a collision. The steam and noise scared his spirited animal and the horse jumped forward and dashed wildly down Broadway. Finally the horse turned into the curb and threw Dr. Moore out on the pavement where he lay unconscious. Mrs. Moore caught the reins as the horse started for the middle of the road again, but was unable to stop its speed. She kept her seat, however, guiding the horse between passing carriages. Believing that she might be thrown out at any moment she firmly grasped the reins with her right hand and drew up the robe on her lap and wrapped it around her head to protect it if she were thrown out.

In front of the Rural Cemetery the horse dashed against the wall throwing Mrs. Moore high in the air and over the wall into the cemetery. Some of the workmen who rushed to her assistance found her semi-conscious. A carriage was called and she was removed to her home, where her husband had been taken by passersby who witnessed the accident. Drs.

DeHart and Purdy were summoned and found both suffering from many dislocations, cuts and bruises.

The men in the automobile kept right on, never once turning to see what damage they had done. After scaring Dr. Moore's horse they frightened several other horses, among them that of Frederick Paine, a coal merchant. Paine's horse started and before Mr. Paine could control him he was thrown to the roadway, his carriage demolished and the horse injured. Several drivers tried to follow the strangers, but the flyer out distanced them and they were soon lost to view on their way to Mamaroneck. It is believed that the auto is owned by some of the residents of Orienta Point."

In West Virginia, outside of the larger cities, our experience with this thing is yet very limited. But before the next legislature adjourns there ought to be a statute that would prevent these new comers from monopolizing the roads, or otherwise we will have a reign of terror before the next succeeding legislature, two years hence, can come to the rescue.



One of the campaign stories that floated through the cloak room recently, says the *Washington Post*, related to Senator Fairbanks, of Indiana, and Governor Shaw, of Iowa, the newly appointed Secretary of the Treasury. According to the story these two orators were stumping Kentucky. After a successful meeting the Kentucky colonel who had the two Republican statesmen in charge invited them into the hotel for some refreshments.

"What'll you have?" he asked Senator Fairbanks.

"A little cold Apolinaris," was the reply.

"And you?" said the host to Governor Shaw (who is a good Methodist, and resides in one of the best dairy counties of the Hawkeye State).

"I think I shall have a glass of buttermilk."

The waiter turned to the Kentuckian.

"What shall I give you, colonel?" he asked.

The Kentucky gentleman heaved a long sigh. "Under the circumstances," he said, "I think you can give me a piece of pie."

Bill of Lading Not Conclusive.

THE Supreme Court of Kansas in *Missouri, K. & T. Ry. vs. Simonson* (April, 1902, 68 Pac., 653) decided a question of some novelty and of general interest. It was held that a statute of Kansas, which makes the specification of weights in bills of lading issued by railroad companies for hay, grain, etc., shipped over their lines conclusive evidence of the correctness of such weights, is unconstitutional, because denying to the companies due process of law, and wrongfully depriving the courts of the judicial power to determine the weight and sufficiency of evidence. The decision by a bare majority of the court and the dissenting judges make out a somewhat plausible case. It is conceded, both by the majority and the minority, that a Legislature has the right to modify the rules of evidence. Statutes making certain proof, documentary or oral, merely presumptive evidence, fall within such power. When, however, a Legislature assumes to make evidence of any kind *conclusive* evidence, it in effect takes away the right of judicial trial of the question of fact comprehended by it. This, as we understand it, is the gist of the argument of the majority of the court, and it would seem to be sound.



Will the person who exchanged a very large old cotton umbrella for a new silk one at the Methodist supper last Wednesday night, as soon as they find out the mistake, return the silk one to the owner?—*Fairfield Journal*.

Not unless persons in Maine are diametrically different from most other persons. The person who mistakes a very large old cotton umbrella for a new silk one will prefer to continue in his delusion.

"History"—So Dubbed.

ONE Granville D. Hall, who was formerly resident in West Virginia, but whose peregrinations have landed him in Ohio, has issued a book which purports to be a "history" of the rending of Virginia.

Any accurate and discriminating contribution to the events which culminated in the erection of this State would be received as a valuable addition to a history which opens a wide field and which is as yet but little explored and the existing material for which is unfortunately very meager.

But Mr. Hall seems to have designed a volume that would perpetuate the personal hate and spite and bitterness that was engendered by the intense partisanship of that period between men who were honest and patriotic, but who differed as to the best course to take under conditions that were entirely new and trying to the best statesmanship. Those patriotic men who forged from the "raw material," so to speak, the sovereign State of West Virginia were naturally not all of one mind as to the means to a common end, and they contended warmly with one another, and erred in their individual judgments many times, but they had a single purpose in view, and when the majority had determined the course they all patriotically fell into line and joined hearts and hands in reaching the common end.

What boots it, now that the end was reached, though through much contention, and the new State is a veritable entity, that the pioneers in the great and glorious movement were sometimes individually wrong, and that they warmly antagonized one another as to the means to the end, if by such contention they wrought out, as all such schemes are wrought out, the one patriotic purpose in view?

It must be a very devilish, uncharitable spirit that would

want to hold up to the light at this day the human foibles and the human mistakes of the patriotic men whose struggle gave us the new State, and to interpret them as lacking in loyalty, and put such things in a book, and hand it down to future generations under the name of history!

Yet in this volume that this man has put forth there is scarcely one of the men whose memory this State reveres for his patriotic and self-sacrificing devotion to the work of its establishment, and whose names are household words with our people, whose character and motives are not besmirched and impugned by this cold-blooded *historian* (?)

If the book has any other purpose than this it is not disclosed.

It reminds us of one who has sat as an auditor under an eloquent and instructive address and then gone away to tell what an ugly bonnet Susannah Smith wore; and what a dude Miss Jemima Brown had for a beau; and to retail all the little tittle-tattle of the occasion as the principal features of the inspiring event, without mentioning the address.

We do not believe there has ever a book been put forth under the title of a "history" that discloses a more malignant, narrow and partisan spirit than this same volume.

The title is a misnomer. It ought to be inscribed "THE SCAVENGER," and buried in a low, deep grave along side of meanness.



A gift by a man to his wife of a certificate of stock in a corporation, which is immediately delivered and retained by her, is held, in *First Nat. Bank vs. Holland* (Va.) 55 L. R. A. 155, not to be affected by his subsequent receipt of the dividends thereon, and mention of the stock in his will and in an assignment for creditors as having been given to her.

That one injured by a defect in a city street was a member of the city council is held, in *Danville vs. Robinson* (Va.) 55 L. R. A. 162, not to prevent his recovery of damages for the injury, if he was not a member of the committee having supervision of the highways, and was not charged with the duty of making repairs.

**Evidence of Wealth of Defendant on the Question of
Exemplary Damages.**

IN *Tucker vs Winders*, decided in the Supreme Court of North Carolina in April, 1902 (41 S. E., 8), it was held that, in an action for unlawful arrest, evidence of the reputed wealth of the defendant was competent on the question of punitive damages, and the plaintiff was not restricted to proof of the tax list. The court upholds the decision upon the principal point involved by previous cases in its own forum. The rule laid down, however, is one of quite general application. In a note to *Rowe vs. Moses*, a South Carolina case, in 67 Am. Dec. (p. 560), a number of concurring cases are collected and summarized. The same rule is stated in *Sedgwick on Damages* (vol. 1, sec. 385, 8th ed.). This learned author cites many authorities upholding the rule, and one opposed to it, i. e., *Guengerich vs. Smith* (34 Iowa, 348). As matter of strict logic it would be difficult to answer the following passage from the dissenting opinion in the case last named: "The law permits such (exemplary) damages to be recovered for the correction and punishment of the defendant, and as an example to the community. Now it is plain that a verdict of a few dollars, which would operate as a punishment, if assessed against a poor man, would utterly fail to have that effect upon a man of wealth. Verdicts for punitive damages ought, therefore, to be graduated according to the ability of the offender to pay. Nothing else would be just or reasonable."

As our own Court of Appeals has gone to the extent of overruling itself to assert and maintain the right to exemplary damages, it is to be inferred that it would, on occasion, uphold the doctrine of the North Carolina court and allow the jury to "size a defendant's pile."

Justice vs. Justice.

TO THE BAR:

FOR statement of the case see BAR (May) page 228. As we understand Judge Hugus sustained the judgment of the second Justice on the "ground that the first Justice had no jurisdiction to try A. upon his voluntary appearance, nor until a warrant had been sworn out charging him with the assault, and A. had been arrested and tried under the warrant, unless the assault had been committed in his presence or that of an officer."

That the Justice has jurisdiction, under the restrictions imposed by law, to try assaults, is found in Sec. 219, Chap. 50, of the Code, a part of which reads: "In cases of assault and battery, unless committed on a Sheriff or other officer of justice, or riotously, or with intent to commit a felony, etc."

What restrictions does the law impose? They are found in Sec. 221 of same chapter, viz.: "The proceedings before the justice shall be by warrant of arrest in the name of the State, except when an offence of which the Justice has jurisdiction is committed in his presence, or in that of a Constable, either of them may forthwith apprehend the offender, or cause him to be apprehended, and in such case the offender may be tried before the Justice and dealt with according to law, without such warrant."

Now it is clear that there is no authority for the Justice to proceed except by warrant, or when the assault is in the presence of a Justice or Constable.

It is true that "a plenary judicial confession, i. e., a confession made by the accused before a tribunal competent to try him, is sufficient whereon to found a conviction." Am. & Eng. Enc. Law (1st Ed.), 445. It is in other words a plea of guilty. Can the defendant enter this plea until he is charged with an offence in the manner prescribed by law? We think not. The decision of Judge Hugus is in accord with the spirit and letter of the law. Nothing should be read into this statute. It nowhere authorizes the voluntary appearance of a person, and the acceptance of his

confession to an offence by a justice, although such justice may have jurisdiction of the offence. Nor is this the rule in the Circuit Court. There is no case of record, so far as the writer knows, where the Circuit Court permitted a person to plead guilty of an offence until he was first indicted therefor and brought before the court in the manner prescribed by law, charged with the commission of the offence. As the case was before Judge Hughs there was nothing in the record to show that the first Justice had jurisdiction, viz., that warrant had been issued, or an offence committed in the presence of an officer; while the proceedings before the second Justice were regular, and showed the jurisdiction of the Justice, and therefore the holding of Judge Hughs as above stated is correct.

MARCELLUS M. THOMPSON.



A certain good physician whose door bell rang late one night, supposing that the summons was from some one who needed his services, rose from bed, put on his dressing gown, and went down to the door.

A colored man stood there, holding a huge paper package, from which buds and leaves were protruding.

"Is Miss Ca'line Ward in?" asked the man.

"She has retired," returned the doctor. Miss "Ca'line" Ward was his colored cook.

"I's sorry, sah, to call so late. Dah was a jam in de street cars. I'll leab dis fo' her, sah, ef you will kindly gib it to her in de mo'nin'."

"Certainly," said the doctor. He took the bundle carefully, closed the door, and carried the flowers to the kitchen. There he placed a dishpan in the sink, drew a few inches of water in it, carefully pressed the base of the package into the water, and went back to bed, thinking how pleased Miss "Ca'line" would be.

The next morning he went into the kitchen early, to find the cook holding a dripping bundle. Her manner was belligerent, and her tone was in keeping with it.

"Ef I had de pusson 'eah dat did dat," said she, "I'd empty the kittle on 'em. I'd jes' like to know who put my new hat in de dishpan—dat I would! I'd scald 'em for sho!"

Mutual Assault.

“Ben Battle was a soldier bold,
And used to war's alarms,
But a cannon ball took off his legs,
So he laid down his arms.”—*Hood*.

THE Supreme Court of North Carolina recently had before it a case of *State vs. Battle*, 41 S. E. Rep. 66. There is nothing in the report which definitely shows that the defendant was a lineal descendant of the hero of Mr. Hood's poem, but there are two circumstances which strongly tend to indicate that this was the fact. One of these is the name. If the name of the defendant were Smith it would perhaps not be proper to draw the conclusion that he was necessarily the descendant of any Smith who might casually be met with in ancient literature. This follows from the well known fact that the name Smith is not unusual, but on the contrary is of rather frequent occurrence. No such statement can properly be made with respect to the name Battle. The only two places in which I have ever met the name were in the report of the case above referred to and in the pathetic ballad of Faithless Nellie Gray. It seems reasonable, therefore, to conclude that the hero of the ballad was the ancestor of the defendant in the lawsuit, even although Nellie Gray would not marry him.

If the conclusion does not seem warranted from the identity of the name, it certainly may fairly be deduced from what we know of the characters of the two men. Ben Battle was used to war's alarms, and the defendant in this recent case was a fighter.

The legal problem before the court was that of a mutual assault. The indictment charged that the two defendants who were named in it, Mr. Battle and Mr. Powell, mutually assaulted each other. The word mutual does not seem to be

free from some confusion with respect to its proper signification. Mr. Charles Dickens employed this word in constructing the title for one of his favorite books, *Our Mutual Friend*. Upon investigation it appears that the friend referred to in the title was a person who was the friend of two other persons. He was, so to speak, a third person singular. The two other persons were conjoined by the preposition *our*. The third person was the friend of both of them, and was called *Our Mutual Friend*.

Now if the word was used in this indictment with the meaning given to it by Mr. Dickens, and if, as would be appropriate, the word *enemy* should be substituted instead of the word *friend*, it would be necessary to look somewhere else for the third person who would be the subject of the assault. Under that construction, Mr. Battle and Mr. Powell would have committed a mutual assault. Their mutual enemy would have been some third person, and they would themselves have been more like mutual friends.

But the grand jurors who found the indictment seem to have put another interpretation upon the word. They accuse Mr. Battle and Mr. Powell of having committed a mutual assault, and they seem to have intimated that these two defendants had assaulted one another. Each had committed an assault upon the other, and the assault was thus created into a mutual assault.

Yet the assault does not seem to have been mutual in all its characteristics, for the court suspended judgment as to Powell and sentenced Battle to imprisonment. Manifestly if the assault had been strictly mutual the punishments would have been identical.

It has always seemed reasonably clear as a matter of law that if a person were assaulted he had the right to defend himself, and he could only do this under ordinary circumstances by fighting, or as it would be technically put, by assaulting his assailant. His defence would be wholly

justifiable, and would not be a criminal act upon his part, nor warrant an indictment nor punishment. It must be manifest, therefore, that in the case of a mutual assault each person is assaulted, and, therefore, has the right to defend himself. Consequently he is justified in the execution of this right and commits no crime. It must follow, therefore, that the act of each, in the case of a mutual assault, is justifiable and free from crime, and, therefore, that a mutual assault would present circumstances which would show that neither of the persons implicated could properly be punished. In truth the court could not impose with propriety any punishment upon the persons who might engage in a mutual assault, unless the court should first determine as a matter of law that Mr. Dickens' interpretation of the word mutual is the proper and the only interpretation.



To Circuit Clerks.

THE BAR would be glad to learn from Circuit Clerks now in office whether they will stand for re-election next fall. We will publish in the next number a list of those who will be candidates again, as a matter of interest and information to the readers of THE BAR. It may be of some advantage to those who are candidates, and in any event it will not cost them anything; and we are sure it will be an item of interest to the profession to know who are candidates for re-election in the different counties. The Circuit Clerks have been very kind to THE BAR, as a general rule, and we would gladly do anything that may promote the individual interests of such. Let each of them please drop us a postal card, whether he intends standing for re-election or not.

The Irreducible School Fund Amendment.

THE last number of the *West Virginia School Journal* contains two articles on the question of the expediency of the proposed amendment to the Constitution relating to the irreducible school fund. Each of them is from the pen of an ex-Superintendent of Schools, who may be presumed to have given the subject intelligent consideration, and whose judgment is worthy of respect on this important measure. The first of these articles is by Hon. Virgil A. Lewis, who opposed the adoption of the amendment, and the second by Hon. B. L. Butcher, who favors its adoption.

Mr. Lewis gives the origin and history of the "Irreducible School Fund" down to the present time, showing the net result of the accumulation to be \$1,100,000, and then proceeds to give the reasons why he opposes the adoption of the proposed amendment, as follows:

By its provision, if adopted by the people at the next general election in November, this Fund is to be henceforth limited to \$1,000,000, and thereafter "All moneys heretofore payable into the Treasury under the provision of said Section 4, to the credit of the 'Irreducible School Fund,' shall hereafter be paid into the Treasury to the credit of the 'General School Fund' for the support of the Free Schools of the State."

By the submission of this amendment the question of the distribution of the whole Fund is eliminated and the people will decide whether this Fund shall be fixed at \$1,000,000 or whether it shall continue to increase in the future from the same sources which have augmented it in the past. Which of these is the wiser thing to do? This question now presents itself to every voter in the State, not as a political one, but as one of the vastest moment to the educational interests of the State—the greatest interest that the people of this or any other commonwealth have

to consider. This Fund, as before stated, now aggregates \$1,100,000, and it is being gradually increased from the two sources named at the rate of from \$45,000 to \$50,000 annually, so that by the time the amendment becomes operative, should it be adopted, the total amount of the Fund will be \$1,200,000. Should this be reduced to \$1,000,000 and kept at that sum? If so, West Virginia will stand almost alone in the matter of a *small* "Irreducible School Fund." A broad statesmanship has by legislation created these irreducible school funds. There is probably not a State in the Union, and it is believed that there is not a commonwealth in the world having a public school system that does not have such a fund or its equivalent in school lands or other property. In evidence of this statement the following is taken from data which the writer collected some years ago, relative to States having permanent School Funds, viz.: Kentucky has such a fund aggregating \$2,200,000; Connecticut, \$2,500,000; Wisconsin, \$3,500,000; Oregon, \$4,000,000; Massachusetts, \$4,000,000, which the Legislature is to increase at the rate of \$100,000 annually until it amounts to \$20,000,000; Iowa, \$4,000,000; Ohio, \$5,000,000; Kansas, \$6,500,000; Minnesota, \$12,000,000, which amount is to be increased to \$20,000,000; Missouri, \$12,000,000; Texas, \$12,000,000; Colorado, Mississippi, Louisiana and other States have from \$1,200,000 to \$2,000,000; while the new States of Washington, Montana and the two Dakotas have created these funds without limitation. More might be given, but this is sufficient to show that the States doing most for education are those having large invested school funds. Then, too, it should be remembered that many States, especially those in the West and Northwest, have large annual revenues derived from school lands that are now of immense value, but West Virginia has none of this.

Our irreducible school fund continues to increase without taxation, and hence its creation and continuance is not felt, nor will it be felt in the future by the people who would feel it if they were required to pay by direct taxation the amount which this fund annually yields and will continue to yield in the future.

West Virginia will, as I believe, take a step backward from among her most advanced sister States in the matter of permanent school funds, or their equivalent, if she limits hers to \$1,000,000. Will it not be better to permit this fund to go on increasing? Let us see. We have said that its annual increase is from \$45,000 to \$50,000. Take the last named amount as a basis. At this rate by the time the amendment, if adopted, becomes operative, the fund will, as before stated, amount to \$1,200,000. This sum, as now invested, will produce annually an income of about \$50,000 to be added to the "Distributable School Fund" each year—that is nearly a thousand dollars to each county—that is to say the annual interest thereon will pay each year for 1,660 months of school at \$30 per month. But more, if this fund is permitted to continue increasing at the present rate for, say 30 years, it will then amount to \$2,500,000, and will at present rate yield an annual interest or revenue of \$125,000. Thirty years is a long time in the life of an individual, but a very brief period in the history of a State, and the question is, shall our children, who will then be the State's citizens and tax-payers, have an irreducible school fund of \$2,500,000, with an annual income therefrom of \$125,000, or shall they have the said fund amounting to \$1,000,000, yielding but \$50,000? Let it be remembered, too, that as the years which make up these thirty come and go, the proceeds of the fund to be distributed annually will far exceed the amount which can be distributed each year from the sources from which the fund is now augmented, but which is to be distributed as a part of the "Distributable School Fund" if the amendment is adopted.

I am aware that it has been said that this fund cannot be invested profitably, but this is a mistake. This is like saying that a business man shall not increase his capital for the reason that he may not be able to find a profitable investment. More than half a million dollars of the present fund is safely invested at from four to six per cent., and the remainder is deposited in banks selected by the Board of Public Works as State depositories, which pay three per cent. on the fund, payable

quarterly, and therefore compounded four times a year. This, of itself, is a good investment, and capitalists are to-day willing to pay large premiums on three per cent. United States bonds. The deposit of our fund in bank is a better investment than this, for we have no premiums to pay. Not only so, but this fund has been and will continue to be of very great usefulness in assisting cities, towns and magisterial districts in the State, in whose bonds it has been invested, to secure good buildings and thus make long strides in their educational work.

But another question. What is to be the future condition of our State? California was once rich in mines, but these have largely failed, and she is now largely an agricultural and fruit growing State. Her irreducible school fund, according to King's Handbook of the United States, is nearly \$4,000,000. If her people had to provide for the support of her educational system by direct taxation alone, it would be a very heavy burden upon them. How will it be with West Virginia in the years that are to come? She is now rich in material resources—timber, gas, oil and coal—but in a few years her forests will be gone, her gas and oil will most likely disappear, as has been the case in other fields. She will still have her coal mines and railroads, but these alone will not defray the expenses of her public school system, and the chief burden of its support will fall upon her agricultural classes. Burden, indeed, it will then be if the system is almost wholly dependent upon direct taxation for its support. Better, then, to have an irreducible school fund of two or three million dollars yielding a hundred and fifty or two hundred thousand dollars annually, which sum will make up a large part of the distributable fund at that time.

I believe that our public school system, new as it is, when compared with that of the older States, should not now be deprived of resources for its future support by curtailing its irreducible school fund. A wise and patriotic citizenship looks to the future as well as the present welfare of the State.

MR. BUTCHER'S ARGUMENT.

Mr. Butcher gives his reasons succinctly in favor of the amendment as follows:

I range myself among those who will vote for the amendment.

My reasons: I do not think that future generations will need the accumulations of this age for school purposes; and am inclined to think they will be better prepared to support their schools than we are to-day. The amount accumulated is comparatively very small when the income only is used. The principal is always in danger of loss by insecure investment in one way or another. Banks go wrong, bonds turn out to be worthless, etc.

I feel that the money in the hands of the people is worth more to them than we get for it when it is loaned out at a low rate of interest. Besides, the State should not engage in loaning money.

The sources from which this fund is derived from, also, is a very serious objection to it. You will observe that among these "forfeited, delinquent, waste and unappropriated lands," is one source of income. The history of the fund will show that the greatest income to this fund is from these sources, so that the greater part of the more than \$1,000,000 now in hand, outside of the amounts turned over by the State of Virginia, has been accumulated "from forfeited, delinquent, waste and unappropriated lands." The income from "waste and unappropriated lands" is small, but from "forfeited and delinquent lands" the amount is large, comparatively. Now, the State and State school taxes on "forfeited and delinquent lands" was *levied for current expenses*, but the owners of the lands failed to pay in the usual way, and the delay resulted in "delinquent and forfeited lands;" and this occurs every year with more or less land, and this amount of the taxes for State and school purposes fails to reach the Treasury. But by subsequent effort the State obtains these taxes either by sale of the land or the owners redeem it. But these taxes do not go into the State Treasury, as the taxes of the prompt tax-payer, but under Sec. 4, Art. 12, go to the Permanent School Fund to be loaned and the interest used for schools. In other words, taking directly from the tax-payers a sum levied for State and State school purposes. This, of course, to that extent increases the amount of taxes to be raised by the prompt

tax-payers, and becomes, therefore, in effect, a direct tax upon property to lay up a fund to be loaned out at a low rate of interest for the benefit of future generations. This is not good business in a State developing from the virgin forest; and is a burden upon tax-payers that should not be imposed.

The sums obtained "from grants, devises, or bequests," and the "estates of persons who may die without leaving a will or heir," are very small, and would better fall into the General School Fund, where they could be utilized in the current expenses of schools, than laid up for interest in future years.

There is another serious objection to the present law that the Amendment may cure. "The proceeds of any taxes that may be levied on the revenues of any corporation," go into this Permanent School Fund. This provision has never been a source of income to the Fund, because the legislature has not levied taxes "on the revenues of any corporations." One of the strong and effective arguments against levying taxes on this source of taxation has been that the taxes thus collected would go into a Permanent Fund and not aid the current income of the Schools. My observation has been that the Legislature does not concern itself much about sources of taxation that do not produce something for immediate or current use! If the Amendment is adopted the Legislature can levy taxes "on the revenues of any corporations" which will go into the General School Fund, and be distributed annually. This would not only lighten the local tax rate, but would help those districts where, with the levies every year at the highest rate permitted by law, they are unable to have more than three months school.

I have always felt that it was the duty of the State to provide funds sufficient to continue the schools at least five months in the year in every district in the State by some form of taxation. As is well known, there are a number of Districts that do not raise sufficient funds for this purpose at the rate of 50 cents on the \$100 permitted by law, together with the State School Fund they now receive.

It is unfortunate that the Amendment is not clearly drawn so

as to avoid the trouble pointed out by Col. Byrne and the loss of affirmative votes threatened, but it is better, in my view, to adopt the Amendment as it is proposed, and stop further accumulation of this fund.

The people of the State have always responded with taxes sufficient to conduct the public business, and they will always be able to do so, I am sure. I am opposed to taking money from them for any other purposes than that of current expenses (unless they authorize it by direct vote upon a proposition submitted to them to make a debt as provided by law.)

It is no argument to point to the immense permanent school funds of the Western States, as those funds cost the taxpayers of those States nothing, being the proceeds of the sales of public lands, which were, by the foresight of our great statesmen, reserved to help the early settlers establish schools in their midst, when it would have been impossible to do so from local levies. Our permanent fund is obtained from no such source, but is gathered in small amounts from *taxes upon real estate*. The taxes on real estate are the chief source of revenue for all current purposes; and, to deflect any part of it to a permanent fund is but adding burdens to an already over-burdened source of taxation."



When Benjamin Franklin went as our first Minister to France he thought it the thing to get him a "court dress." He went to the wigmaker for a better style, but the little Frenchman hadn't a wig large enough for Franklin's big head, and fearing that he would lose the sale he flew into a passion about it. Franklin soothed him by saying:

"O, it isn't your fault, nor the wig's; my head is too big!"

"Oul, oul," said the Frenchman; "me afraid your head is too big for the whole French nation!"



A mere business or other conversation by a juror with another person, entirely foreign to the case on trial, in the presence and hearing of the sheriff and other jurors, although reprehensible, is held, in *State vs. Cotts* (W. Va.) not to render the verdict void.

Multiplying Judicial Opinions.

THE president of the Brooklyn Bar Association, in his address, fulminated against the length and number of judicial opinions.

There is a swelling army of lawyers in every part of the United States that are ready and eager to join in swelling the chorus to this old and familiar song.

But the first protest against a curtailment of judicial exposition we have seen is from a New York exchange, which argues that the main functions of judicial opinions "is not only to formulate a rule of law for the guidance of the conduct of the community that a court expresses its views in an opinion as to the matter of controversy. Another and perhaps equally important purpose is to inform the litigants of the reasons which have induced the judges to decide the case one way rather than another, and to satisfy them that their dispute has been fully and fairly considered in the light furnished by the arguments of counsel and that no important point has been overlooked."

All this is readily recognized and conceded by those who are anxious to submit to an abridgment of judicial literature of this character. What is the profit of "formulating a rule of law" in the same volume or same set of volumes over and over again until it becomes tedious and stale by repetition. Let a clear cut, comprehensive opinion be pronounced upon the first case that calls for a decision involving any distinct principles of law, and upon all subsequent cases involving the principles let the court refer to it with the reminder, "thence our sentiments."

We regard the Massachusetts reports as models of this sensible plan, and it would seem to be an easy and sensible solution of the whole matter.

The Northern Securities Company.

THE decision of the United States Supreme Court to grant leave to the State of Washington to file an original bill in that court enjoining the Northern Securities Company and its constituent companies—the Great Northern and Northern Pacific—increases to four the suits against the Northern Securities Company. The other three are the action begun by the Attorney-General of the United States against the Company for alleged violation of the Anti-Trust Law, the action begun by the State of Minnesota in the Ramsey County District Court of that State, and the Peter Power suit in New York State. The suit begun by the State of Washington had already been foreshadowed by an application from the State of Minnesota for leave to file a similar bill for an injunction, but the petition to file was denied by the Supreme Court because indispensable parties to the case could not be brought to the Court. This objection does not confront the Court in the present case, as these parties are not corporate citizens of the State of Washington, and hence leave to file could be granted and subpoenas issued returnable on the first day of the next term of the Court in October. Among objections to granting leave, it was urged that the Supreme Court has no jurisdiction in the subject-matter because the bill does not present the case of a controversy of a civil nature justifiable under the Constitution and laws of the United States, in that the suit does not involve rights of a proprietary or contractual nature, but is purely a suit for the enforcement of the local law and policy of a sovereign and independent State whose right to make laws and to enforce them exists only within itself, by means of its own existence, and is limited to its own territory. The Court decided otherwise. Chief Justice Fuller's opinion consisted entirely of a review of the original cases of the same character which have been brought to the attention of the Supreme Court, the two most important thus cited being those of the State of Minnesota vs. The Northern Securities Company, already mentioned, and of the State of Louisiana vs. The State of Texas concerning the quarantine

regulations of the latter State. The Chief Justice declared that the precedent of the Texas-Louisiana case should be followed in the present instance; that is, without intimating any opinion whatever on the question suggested to grant leave to file in accordance with the general rule.



In the mountain sections of the South, in the old days when the judges, on horseback, rode the circuits of the courts, the members of the bar, travelling in similar style, accompanied them, and good fellowship naturally followed. It was usually the case that his honor, being a gentleman of the old school, took his brandy and water with regularity and relish. To this indulgence at his inn would often be added the diversion of a modest game of poker. In Georgia, in the county of R——, bordering on the North Carolina line, at the fall term of the court, many years ago, the judge who was to preside arrived at the town tavern on the forenoon preceding the day on which the court was to convene, and after supper a number of the lawyers, as their habit was, gathered at the room of the genial and convivial dignitary to pass the evening. As an accompaniment to the "apple jack," thoughtfully provided by the host, there was nothing more natural and agreeable than a friendly game of draw. Into the good-humored gathering, at the invitation of the inn-keeper, had dropped a couple of the well-known planters thereabouts—among the men of the best figure in the county—desiring to meet his honor and to renew acquaintance with their legal friends. A game was soon going, all hands joining in, and it was a late hour before chips were cashed and the jovial party dispersed. On the following morning, after duly opening court, the judge began his charge to the grand jury. After giving in charge the most important things, his honor said :

"Now, gentlemen of the jury, I come to charge you concerning the pernicious habit of gaming,—the vice of poker playing. I do not know anything about it myself," and looking up from his manuscript and glancing over his spectacles, that hung low on his generous nose, he espied on the jury one of the planters who had been in the game with him the night previous; so clearing his throat he continued,—“that is, I don't know *much* of it, but it's a pernicious practice and should be broken up."

A Jail With 475 Murderers.

THE mediæval fortress of Volterra is now a formidable prison house, says the *St. James's Gazette*. When last I visited it there were 475 prisoners within its walls, all of them murderers. It is an uncanny sensation to look upon nearly 500 human beings, each one of whom has taken the life of at least one other human being. One hundred and forty-nine of them were condemned for life, and that meant murder of a brutal and cold-blooded description; the remainder were imprisoned for periods ranging from fifteen to thirty years, and that would mean murder with extenuating circumstances—murder the result of inconstancy in a sweetheart, or frailty in a wife, or faithlessness in a friend. The confinement is rigorously solitary and cellular; the exercise courts are cellular; there are cellular smithies and cellular workshops; nay, the very chapel is cellular. Two tiers of cells run one above the other, and the prisoner in each, while unable to see his fellow convicts, can through a long narrow loophole see the altar and the priest who is saying mass.

As I walked round the ramparts of the great fortress I could look down into the rows of high-walled exercise courts—not more than 10 feet by 10, I should say—in each of which the convict was taking the hour of exercise which he is allowed daily. Every prisoner saluted respectfully, and showed his white teeth in a pleasant smile, glad at the sight of any fresh face. Italian prisons are models of good order and cleanliness, and the cheerfulness and natural patience of the Italian temperament does much to lighten the labor of Italian prison officials. The convicts get two full meals of beans, lentils, or paste, cooked in lard, and meat on Sundays and holidays. Every prisoner may spend 25 centesimi a day, if he has it or can earn it; therefore wine is by no means an unknown luxury in the prison.

The system of rigorous solitary confinement leads to frequent cases of madness. Indeed, there is often talk of the Italian Government abolishing the system on account of the great expense of maintaining numerous criminal lunatic asylums.

A Proposed National Park.

AN association composed almost equally of Union and Confederate veterans was formed in 1898 to establish a National Park in Virginia on territory including the four battlefields of Fredericksburg, Chancellorsville, the Wilderness, and Spottsylvania—the scene of the final encounter between Grant and Lee. The project has been approved by the Secretary of War and organizations of the veterans of both armies. The land can be obtained under condemnation proceedings, in accordance with Virginia law, private speculation being thus eliminated. A bill providing for this park has already passed the Senate of the United States and has been favorably reported by the Committee on Military Affairs of the House of Representatives; its success now apparently depends upon the Speaker of the House, who has heretofore exercised his authority to prevent action upon it. Many reasons are given for the distinctive value of this park; the battles fought there were the result, not of unexpected circumstances, as was the battle of Gettysburg, but of strategic foresight and military planning; the armies engaged were not local but National in character; the territory is in the State in which both the opening and closing battles of the Civil War were fought; the historic interest of the place is not confined to the events of the Civil War, but includes associations with the colonies, the War for Independence, the lives of Virginian statesmen; the site is accessible to both North and South; and, not least, the cost of securing and maintaining the park would be comparatively small. Concerning the value claimed for the park as a place for instruction in military maneuvers and for mobilization in time of war we do not venture to express judgment. There can be no doubt, however, in view of the plans to save this historic place from despoliation by lumbermen and to develop it artistically, that this park would be a worthy expression of historic reverence and love of beauty.

The Court Recognized the Charm.

WHEN Lord Chief Justice Holt presided in the Court of the Bench a poor, decrepit old creature was brought before him, charged as a criminal, on whom the full severity of the law ought to be visited with exemplary effect, says the *Mirror*.

"What is her crime?" asked his lordship.

"Witchcraft."

"How is it proved?"

"She has a powerful spell."

"Let me see it."

The spell was handed to the bench. It appeared a small ball of variously colored rags of silk, bound with threads of as many different hues. These were unwound and unfolded, until there appeared a scrap of parchment, on which were written certain characters now nearly illegible from much use.

The Judge, after looking at this paper charm a few minutes, addressed himself to the terrified prisoner. "Prisoner, how came you by this?"

"A young gentleman, my lord, gave it to me, to cure my child's ague."

"How long since?"

"Thirty years, my lord."

"And did it cure her?"

"Oh, yes, and many others."

The Judge paused a few moments, and then addressed himself to the jury. "Gentlemen of the jury, thirty years ago I and some companions, as thoughtless as myself, went to this woman's dwelling, then a public house, and, after enjoying ourselves, found we had no means to discharge the reckoning. Observing a child ill of an ague, I pretended I had a spell to cure her. I wrote the classic line you see on a scrap of parchment, and was discharged of the demand on me by the gratitude of the poor woman before us for the supposed benefit."

Discounting the Future.

TWO gentlemen were talking in a railway car about the failure of a professional man whose prospects were bright, and whose standing was apparently high and sure. The one who knew about the case was asked for the cause, which being stated, the other replied, "This was discounting the future pretty largely." He had been sustaining his energies by stimulants.

This answer is a mine of wisdom. Alcohol, patent medicines, tobacco, coffee, tea, quinine, the bromides, cocaine and opium may (some of them in small quantities, others in excess) be used as means of discounting the future. He who uses stimulants of any kind as a means of supporting efforts of which he would otherwise be incapable, is exhausting the latent forces of his constitution, and makes himself in debt to nature, which always charges a heavy rate of interest, and forecloses either with or without notice, and from whose suit there is no appeal. Many a man discounts the future when he commits deeds which, if exposed, would ruin him, and which are of such a nature that to prevent exposure he must give most of his time and thought to concealing them. A man "discounts the future" when he utters or acts falsehood, and when he attempts to reach an end by serpentine methods. His victories are really not triumphs, but precursors of final collapse.



The superintendent of mails in the postoffice gets his share of foolish questions. A man recently said :

"I want to get a letter to my brother sailing on the *Majestic*, which isn't due until Wednesday. I don't know where he will stay in New York or where he will go next."

"All right," said the clerk. "Address your letter 'John Smith, passenger on board incoming steamer *Majestic*, due in New York Sept. 12,' put domestic postage on it, and it will reach him."

The man thanked the clerk, but came back again later.

"Say," said he to the clerk, "about that letter ! I addressed it and stamped it all right, but the man's name isn't John Smith. How about that?"

Willed a Lock of Washington's Hair.

AMONG the wills probated yesterday by Register Singer was that of Mrs. Ellen Sergeant, who died recently at her home, 401 South Forty-first street, leaving an estate valued at \$30,000, says the *Philadelphia Press*. Among her effects was a bracelet containing a lock of hair of George Washington. This she bequeaths to the Society of George Washington Headquarters at Valley Forge. The lock of hair was given to Mrs. Sergeant's grandmother by Gen. Washington for an act of kindness done for him while at Valley Forge. It is said there may be a romance in the little lock of hair.



In examining a witness General Harrison had that rare faculty to know when to quit. He seldom caught a tartar. In one case an elderly and irascible lady witness came to the stand. She was a very "willing" witness, and testified volubly and extravagantly. When passed over to General Harrison for cross-examination, there was a look of triumph in her eyes. She squared herself for a bout, when he said:

"You may stand aside, madam."

"Oh, I have heard of you; you can cross-question me as much as you please; I am not afraid of you," she said.

"I have no questions to ask you, madam," was his bland reply; and she was finished.



Bridget and Pat were sitting in an arm chair reading an article on "The Law of Compensation."

"Just fancy," exclaimed Bridget; "accordin' to this, whin a mon loses wan av 'is sinces another gits more developed. For instance, a blinnd mon gits more sinse av hearin' an' touch, an'——"

"Sure, an't it's quite thrue," answered Pat.

"Oi've noticed it meself. Whin a mon has wan leg shorter than the other, begorra the other's longer."

A Remarkable Will.

THE most remarkable will ever heard of was that of a rich man who died not long ago in Berlin. The will was to be opened immediately, and a codicil was to be opened after the funeral. The will said, "Every member of my family who shall abstain from attending my funeral is to receive 300 marks." They all remained away from the funeral except his housekeeper, a distant cousin. On the codicil being opened after the funeral it was found to enact that the residue of his fortune was to be divided among those who, notwithstanding the loss of the 300 marks, attended his funeral; hence the housekeeper gets all. The heirs threatened to dispute the will, but if the jury should have six hard-headed men who stand for the letter of the law, and six who have a sense of humor, the will will be sustained, unless some unusual facts are brought out. If they had thought him crazy they would have attended. The presumption is that they considered him sensible, and stayed away.



An episode has been recalled in the life of the late Justice Field, of the United States Supreme Court, whose temper was of the most irascible kind. He had given instructions to his servant on a certain morning that he was not to be disturbed. Presently there came a ring at the door bell and an aggressive book agent appeared.

"I want to see Justice Field," he said.

"You cannot see him," was the reply.

"I must see him."

"Impossible."

The conversation grew more emphatic, until finally the persistent book agent's demands echoed through the house. At that moment Justice Field, who had been attracted by the altercation, appeared at the head of the stairs.

"William," he said, in a fiercely angry tone, "show the brazen scoundrel up to me; if you cannot handle him, I will."

The book agent made no further effort to break into the justice's presence.

WEST VIRGINIA COURT OF APPEALS.

Decisions Handed Down at the Last Term.

REPORTED SPECIALLY FOR THE READERS OF THE BAR.

Appearing Here For the First Time in Print.

Reuben White vs J. B. Wilkinson et al.
Dent, P.
From Mingo County.
Judgment affirmed.
Syllabus.

If the auditor through mistake or otherwise certify for sale a tract of land delinquent, for the non-payment of taxes due thereon to the sheriff of the county in which such land is not situated, at the date of such certification, a sale thereof made by such sheriff is illegal and void, and a deed made in pursuance thereof by the clerk of the county court is likewise void and vests no title in the purchaser.

Hannah Hall and W. G. Morgan
vs
Mark Packard and F. M. Boynton.
Dent, P.
From McDowell County.
Decree reversed and remanded.
Syllabus.

1. Service of summons on a non-resident in the county in which the same is issued does not abate an attachment nor furnish good grounds for a demurrer to a bill in equity, founded on the fact of such non-residence.

2. Personal service of summons does not establish residence, for such service may be had on a temporary sojourner or passing traveler.

State of West Virginia vs Jesse R. Irwin and others.

A. H. Stoddard and Amos C. Hall, Appellants.

Millard McDonald and Bruce McDonald, Appellees.

Dent, P.

From Logan County.

Decree affirmed.

Syllabus.

1. Points once adjudicated by a final decree cannot again be put in issue between the same parties or their privies in the same or another suit, unless it be by a direct attack on such final decree through appeal or other legal method.

2. A person who buys the title of the State to forfeited lands at a judicial sale is bound by the final decrees entered in the suit in which such sale is had, prior to the confirmation thereof, as though he were a party to such suit.

Bank of Greenbrier vs Nancy Effingham.

John E. Kelley, Appellant.

Dent, P.

From Greenbrier County.

Decree affirmed.

Syllabus.

Two persons unite in a joint deed giving to a third person all their personal property "that they may have at the time of their death," and reserving "the "use and control" thereof "so long as they both shall live;" they thereby create a joint tenancy survivorship in such personal property, the manifest intention of which is that on the death of one, the residue vests in the survivor, and such third person is not entitled to any of their property until the death of both the grantors.

R. H. Arthur vs The City of Charleston.

Dent, P.

From Kanawha County.

Affirmed.

Syllabus.

1. It is the positive duty of a municipality to keep its highways free from obstructions and defects, dangerous to travel thereon in the ordinary modes, to those using reasonable care and prudence, and it is not necessary to allege or prove that the city had notice of such obstructions or defects.

2. In cases of temporary necessity a municipality may allow obstructions on the public sidewalks or streets, but the traveling public should be warned of and protected against the same in some proper manner.

3. Whether a person is so intoxicated as to be unable to exercise ordinary care or prudence is a question of fact for the jury, and unless plainly against the preponderance of the evidence its finding will not be disturbed.

4. Though proper instructions may be refused, yet if other in-

structions are given covering the same questions and to the same effect such refusal is not reversible error.

I. M. Creel vs The Charleston Natural Gas Co.

Dent, P.

From Kanawha County.

Affirmed.

Syllabus.

If a tenant open a service pipe and knowingly permit the same to remain open and the gas to escape therefrom into or under the property occupied by him and then carelessly ignites the same his landlord cannot recover from the gas company the damages occasioned by the resulting explosion, although such gas company was guilty of negligence in not having cut the gas off from such service pipe.

W. H. H. Shaffer vs J. Mather Shaffer.

Dent, P.

From Tucker County.

Affirmed.

Syllabus.

1. It is not error for the circuit court to reject a bill of review founded on after discovered evidence wholly insufficient to reverse the decree sought to be reviewed.

Wetherd vs Elliott, 45 W. Va., 436 (32 S. E., 209).

2. Although the conclusion reached by the circuit court may be subject to grave doubts this court will not reverse its action unless plainly erroneous.

Neughton vs Taylor, 50 W. Va., — (40 S. E., 353).

W. Brent Maxwell vs Central District & Printing Telegraph Co.

Dent, P.

From Harrison County.

Affirmed.

Syllabus.

1. The erection of telephone poles along the streets of an incorporated city, town or village with the consent of the council thereof is not such taking of private property for public use as will authorize the abutting lot owner to enjoin the prosecution of such work until his damages occasioned thereby are paid or secured to be paid.

2. Such a privilege is a mere easement carved out of, subservient and appurtenant to the public easement in such street.

3. Before an individual or company may invade and destroy in whole or part for other public purposes a public improvement placed on the street by an abutting lot owner in front of his property under agreement with the council of the city, town or village, specific authority for so doing must first be obtained from such council.

C. & O. Ry. Co. vs A. T. Wright et al.

Dent, P.

From Greenbrier County.

Prohibition refused.

Syllabus.

If a defendant to a suit instituted before a justice after making a specific appearance for the purpose of quashing a fatally defective return of service of summons, enters a general appearance to the action, proceeds with the trial of the case and the presentation of his defence, and on judgment being rendered against him appeals to the circuit court, he thereby cures the defects in the service and abandons his specific appearance and submits himself to the jurisdiction of the justice and the court, and after final judgment rendered against him by such court he cannot prohibit the collection of the same because of the defective return of the summons.

The Board of Education of Black Fork District

vs

John Homer Holt, Judge, &c.

Dent, J.

From Tucker County.

Prohibition awarded.

Syllabus.

1. As an ordinary rule of practice, subject to all just exception, this court will not award a writ of prohibition to a preliminary rule or injunction issued by the circuit court or judge thereof, until an application has first been made to such judge or court to discharge or to dissolve the same and such judge or court overrules or refuses to entertain such application. Such application may be made and acted on during the pendency of a rule in prohibition in this court without being in violation thereof.

2. An injunction does not lie to control the action of a Board of Education as to matters within its jurisdiction.

3. A prohibition does not lie to control the action of a Board of Education unless it is usurping judicial powers not conferred upon it by law or exercising such powers in a manner contrary to law.

W. N. Hubbs, P. & D. E., vs Nannie Swabacker, D. & P. E.

Dent, J.

From Marshall County.

Reversed and remanded.

Syllabus.

By two judges, Dent and McWhorter.

1. If a sale of land is made under a deed of trust and at the time thereof there is an understanding had, concurred in by the purchaser, that a portion of the crop growing on such land is not included in such sale, such purchaser cannot afterwards set up a valid claim to such excluded portion of such crop under such sale.

2. A purchaser at a trustee's sale who gets the whole amount of

property that he understood he was bidding for, cannot sustain a valid legal claim to a portion of the property covered by the trust deed, which he understood at the time of the sale, was excluded therefrom.

3. If a purchaser admits an understanding had at the time of his purchase growing out of a mutual misunderstanding of law or fact, and according to which he made his purchase and secured the land sold, he is estopped thereafter from setting up a claim adverse to such understanding.

Myrtle L. Barker, Defendant in Error,
vs
Ohio River Railroad Company, Plaintiff in Error.
Dent, J.
From Mason County.
Affirmed.
Syllabus.

1. It is the duty of a railroad company to keep its depots and platforms in safe condition and free from dangerous defects for the safety of its passengers.

2. A person going to a depot to become a passenger has the right to presume that the company has discharged such duty, and is not bound to keep a lookout for defects occasioned by the company's negligence, other than such as ordinary prudence might require for self-protection.

3. If a passenger while trying to get her children onto the platform of a railroad station, unconsciously steps back into a hole in the platform of which she had no previous knowledge, she is not guilty of contributory negligence, although if she had been walking face forwards, in the direction of such hole she could have easily seen the same. Her walking backwards or failure to look backwards is not negligence when there is nothing to warn her of the company's negligence, and it is not her duty to presume it or look for it.

4. A railroad company cannot be excused from gross negligence on its part, although the act of the injured person contributed thereto, unless it be shown in evidence that such person was guilty of legal negligence, that is, some act of negligence that an ordinarily prudent person would not have been guilty of under the same circumstances.

5. It is not reversible error to admit in evidence the fact that the plaintiff's two children who were with her at the time of her injury were still living.

6. It is not reversible error to permit a physician to give his opinion as to the cause of a diseased condition of the human body.

J. S. Thompson vs A. W. Nowlin.
Dent, P.
From Summers County.
Decree affirmed.
Syllabus.

1. If an attorney at law by virtue of his employment performs

services for an administratrix in the prosecution of a claim due the estate, to be paid for out of the proceeds thereof, and another administrator is substituted in lieu of the first and afterwards receives such proceeds, such attorney is entitled to payment for such services therefrom unless he has been otherwise paid therefor.

2. A general creditor may maintain a suit in chancery against a non-resident administrator appointed in this State, who has failed to return the inventory and make settlement of his accounts as required by law, and who has squandered the estate and become insolvent and the sureties on his bond are proper parties to such suit. If in such suit the administrator confessed assets which he has converted to his own use, the plaintiff is entitled to a decree for his claim against such administrator individually, and his sureties and a reference to a commissioner is unnecessary.

State vs Edwards.

Poffenbarger, J

From Harrison County.

Affirmed.

Syllabus.

1. Where a person, by means of some fraud or trick, procures the delivery of money or goods to him by the owner, with the intent to steal the same, it amounts to a taking of the property within the definition of larceny, unless the delivery of the possession is made for the purpose of passing the title to the property as well as its possession; and, if possession be acquired by such means and with such intent and the goods or money are afterwards converted by the taker to his own use, the offense is larceny.

2. Where both possession and title are obtained by false pretenses with intent to defraud, the offense is obtaining money by false pretenses, in which case the statute declares that the offender shall be deemed guilty of larceny.

3. When possession is obtained by means of fraud, trick or device, so as to make the taking felonious, and the taker converts the property to his own use, the offense is common law larceny, and a conviction may be had upon a common law indictment for larceny.

4. In such case the indictment need not specify the means by which the larceny was effected.

5. Whether the possession was so obtained with intent to steal is a question for the jury.

6. The instruments, devices or tokens used in the commission of a crime are competent and legitimate evidence in the trial of the accused, and the taking of them from his person by an officer who has arrested him upon a charge of his having committed the crime, is not an illegal seizure, nor is the search of his person for such instruments an unreasonable search within the meaning of the constitutional provision against unreasonable search.

G. W. Hatfield, Appellee, vs A. W. Watson, Appellant.

Dent, J.

From Mingo County.

Reversed and remanded.

Syllabus.

Notice of the reservation of title until property paid for, under section 3, chapter 74, Code, is not required to be acknowledged as a prerequisite to recordation.

J. B. Buskirk, Appellee, vs Jacob Ferrell and others, Appellants.

Dent, J.

From Logan County.

Reversed.

Syllabus.

An unknown party against whom an order of publication has been taken and published may appear within five years after a decree has been entered or within one year after a copy of such decree shall be served upon him, if within the five years limit, and have the same reheard on giving security for costs.

E. E. White, Admr., P. E., vs The L. Hoster Brewing Co., D. E.

Dent, J.

From Mercer County.

Affirmed.

Syllabus.

1. The circuit court has a wide discretion in setting aside verdicts obtained in the absence of either party to the suit in the interest of a fair hearing on the merits, and such discretion will not be interfered with by this court unless the ends of justice will be promoted thereby.

2. The circuit court commits no reversible error in instructing a jury to find for a party in whose favor the evidence plainly and decidedly preponderates.

3. If the material facts are doubtful and a verdict for either party would be sustained, the circuit court should not instruct the jury to find against such party.

G. B. Simmons, &c., vs J. B. Thomasson, Com., &c.

Dent, P.

From Boone County.

Affirmed.

Syllabus.

1. Prohibition lies to prevent the enforcement of a judgment by default when the persons against whom the same was rendered had no notice of the time and place and were not present at the trial.

2. When a justice by agreement of parties transfers a case for trial to the office of a justice of an adjoining district neither he nor his successor in office can try such case in his own district in the absence of either the plaintiff or defendant until he has legally reacquired jurisdiction thereof in such district by proper notice to the parties of the time and place of trial.

Hedrick vs Building Association.**Brannon, J.****From Mercer County.****Dismissed for want of jurisdiction.****Syllabus.**

Where a pecuniary demand in a suit in a circuit court is \$95, and the answer of the defendant admits as due and offers to pay \$61.95, and the decree is against the defendant for \$104.83, leaving the amount actually in controversy \$42.88, there is no jurisdiction for appeal by the defendant.

King vs Doolittle, Judge.**Brannon, J.****From Cabell County.****Writ of prohibition denied.****Syllabus.**

Where an appellate court reverses the decree of a circuit court, and adjudicates the principles then involved in the case, and remands the case, and in further proceedings it is claimed that the circuit court is disregarding the decree of the appellate court, and departing from its decision, and rehearing matters heard in the appellate court, no writ of prohibition lies for the reason that an appeal is the proper remedy.

West End Real Estate Co. vs H. M. Nash.**Dent, J.****From Mercer County.****Judgment affirmed.****Syllabus.**

1. A subscription to a proposed corporation is not binding on the subscriber if the purposes of the organization are materially changed without his knowledge, consent or confirmation, express or implied.

2. A person who was induced to subscribe to a proposed company being organized for the purpose of purchasing and selling a certain tract of land by representations in a prospectus issued by the promoters of such company, who have an option on such land, but conceal the fact from such subscriber, and who afterwards have the same conveyed to the company, of which they become the directors and officers, reserving to themselves secretly a promoter's fund of \$30,000 as part of the price of such land, is not bound by his subscription unless he confirms the same after he learns of the existence of such promoter's fund.

3. Such subsequent confirmation to be binding on the subscriber must be a deliberate act with full knowledge of the fraudulent concealment and of the rights intended to be waived.

4. If a demurrer to the evidence would have been sustained, an instruction to the jury to find for the defendant, even after the jury has indicated an intention to find for the plaintiff, is not reversible error.

Enslow vs Sliger.
Brannon, J.
From Cabell County.
Affirmed.
Syllabus.

The mere payment by a husband, though indebted, but clearly solvent, for lots intended as a permanent home, and conveyed to the wife by his vendor at his request, or payment by him for building a house thereon, will not alone establish actual fraudulent intent, so as to subject the lots to after-made debts; but these are circumstances to be considered with others upon the question of such intent.

Veith vs Salt Co.
Brannon, J.
From Mason County.
Reversed and remanded.
Syllabus.

1. Where one places a steam boiler upon his premises and operates the same in lawful business with care and skill, so that it is no nuisance, in the absence of proof of fault or negligence in him, he is not liable for damages to his neighbor occasioned by the explosion of the boiler.

2. A presumption of negligence does not arise from the mere fact of the explosion of a steam boiler used by one engaged in lawful business. Negligence on his part must be shown.

3. While two special questions covering the same inquiry should not be put to a jury, yet if one covering some matter of another is so drawn as to more definitely and pointedly inquire as to a particular matter controlling the case it should be given.

Uhl vs Ohio River R. R. Co.
Brannon, J.
From Wood County.
Decree affirmed, remanded.
Syllabus.

1. If a writing is not ambiguous it must speak for itself by its words, without aid of any oral evidence; but if it is ambiguous, oral evidence is admissible to show the occasion of the contract, the situation of the parties, the circumstances surrounding them, their subsequent acts in executing the contract, in order to show their intention in making it; but evidence cannot be received to show their declarations, conversations or interlocutions before or at the execution of the contract.

2. The words "right of way" in a grant to a railroad company, taken alone, mean an easement only, and do not pass the very land itself.

3. An agreement grants to a railroad company "the full and free right of way of the width of 50 feet in, upon and through the lands of the said Uhl, which right of way is hereby granted and conveyed for the construction, building and use of the road of said company."

It also says, "And the said Uhl also hereby covenants and agrees to execute and acknowledge in due form of law, when required by said company, a deed conveying to said company in fee simple the land hereinbefore described." Such agreement conveys only a right of way, an easement in fee simple, not the land itself and the oil in it.

4. The covenant in this agreement to execute a deed conveying the land in fee simple is a dependent covenant, and the estate or interest conveyed by the agreement being limited to the right of way, which is an incorporeal hereditament, the operation of said covenant is necessarily restricted and limited by the granting clause, and does not require the conveyance of a greater estate.

5. The covenant in a deed for further assurance means a covenant to execute a deed for further and better assurance of the estate passed in the granting clause, and does not enlarge that estate.

6. In the construction of deeds, as well as wills, the rule nowadays is that the intention of the grantor controls, and technical words of legal import must yield to plain intent, and the whole instrument, not merely and separately disjointed parts, is to be considered.

Schmertz & Co. vs Hammond.

Brannan, J.

From Cabell County.

Affirmed.

Syllabus.

1. Where once a decree has been made fixing the amount of a lien decreed upon land, and its place as a lien, a partial payment does not call for an ascertainment by the court of the balance before a sale under the decree.

2. Where a decree of sale provides for payment to a creditor, allowed a debt by it of money in the hands of a receiver of another court, and provides that when paid it should operate as a partial payment, there is no error in failing to ascertain the amount of such money in the decree, especially where before sale the amount of said money appears in the record of the case.

3. A judicial sale will not be set aside for inadequacy alone unless the inadequacy is so gross as to justify the presumption of fraud. A sale for half the estimated value is not such inadequacy (29 W. Va., 513). Before setting aside such sale for inadequacy there should be some guaranty of an advance on the sale.

4. An attorney has no lien upon a fund which he is not instrumental in creating, and which never came to his hands.

5. An attorney's special lien for pay for his services out of a fund in court exists only where his client is entitled to participate in that fund. He cannot claim it out of a fund decreed to go to a party under a right adverse to that of the party represented by the attorney. Such party cannot be compelled to pay for the services of an attorney rendered against him.

6. Where a fund in court arising from a sale of property is consumed by a prior lien, the attorney representing a junior demand has no lien upon that fund of his services.

Connalley vs Wallace Co.
Brannon, J.
From Mingo County.
Reversed and remanded.
Syllabus.

1. An affidavit of the amount due the plaintiff filed with the declaration under Sec. 46, Chap. 125, Code, made in another State which wants the certificate of a clerk or other officer of the court of that State verifying the genuineness of the officer's signature and his authority to administer oaths, is not good so as to prevent a plea, though that plea is not accompanied by affidavit of the defendant as required by said section.

2. An overruled motion to quash an affidavit of an amount due the plaintiff filed with a declaration under Sec. 46, Chap. 125, Code, is not waived by a further appearance to the action.

Town of Mason vs Railroad Co.
Brannon, J.
From Mason County.
Reversed and remanded.
Syllabus.

1. When a grant by a municipality to a railroad company to construct its road upon or over a street is accepted, it constitutes a contract which cannot be arbitrarily revoked or impaired by the municipality, but such grant is subject always to conditions imposed upon it by statute or by the terms of the grant, and, moreover, is subject also to the proper exercise of police power by the municipality.

2. A grant by a municipality to a railroad company to build its road upon or across a street confers no right to destroy the street, or to have exclusive use of it, but contemplates a joint use of the street by the public and the company, and the municipality has power to enforce a proper use of the grant, and may restrict the company to the use of only so much of the street as is absolutely necessary for its use and consistent with the public use, and may compel a change of location or total removal of a side track materially impairing the use of the street by rendering the part assigned for public passage too narrow.

3. An improper use, damaging to the public, by a railroad company of a grant of right of way over the streets of a town constitutes a public nuisance and is subject to indictment.

4. Mandamus lies to compel a railroad company using a street for its track to restore the street to its former condition, or such condition as will not unnecessarily impede travel, and to make and maintain continuously crossings of streets and alleys over its road.

5. A railroad company cannot leave its cars standing upon a street crossing, or use such crossing as a place of deposit or storage for its cars, and thus obstruct public use of the crossing. It is only entitled to use the crossing for so long as is reasonably necessary to pass over the crossing with its cars.

Falconer vs Simmons.
Brannon, J.
From Roane County.
Affirmed and remanded.
Syllabus.

1. The writ of certiorari properly so considered does not lie from the judgment of a justice upon the verdict of a jury, but an appeal was always the proper remedy. However, such writ of certiorari, by liberality in mere matter of procedure, may be treated as an appeal.

2. An overruled decision is regarded not law, as never having been the law, but the law as given in the later case is regarded as having been the law, even at the date of the erroneous decision. To this rule there is one exception, that where there is a statute, and a decision giving it a certain construction, and there is a contract valid under such construction, the later decision does not retroact so as to invalidate such contract.

Sesler vs Coal Co.
Brannon, J.
From McDowell County.
Reversed and remanded.
Syllabus.

1. To one going upon another's premises, not as a trespasser or mere licensee, but by invitation in legal sense, as for instance, an independent contractor going upon such premises to do a work under contract with the owner, the owner owes the duty of ordinary care to have and keep his premises in safe condition for such person's work, unless defects be known to such person.

2. If a contractor goes upon premises of another to perform a contract to do work for the owner and is injured from defect in the premises known, or which by fair care ought to be known to the owner, and unknown, or which by fair care cannot be known to such contractor, the owner is liable; but under the reverse of these circumstances is not liable.

3. In an action for personal injury, evidence that the plaintiff is a married man with young children is irrelevant and incompetent, and it is error to admit it.

4. Jury trials should be strictly confined to the issues made and the legitimate facts bearing on them, and the practice of dragging in extraneous matters to influence a jury cannot be too strongly condemned. Nothing outside of the legitimate facts should be introduced to affect the minds of those who are to decide the case.

5. When a question is put to a witness and the court refused to allow it to be answered, if the question does not plainly itself import that the answer will prove a fact material, it must appear by a bill of exceptions what was proposed and expected to be proven, else there is no error apparent. If a question objected to is answered, the answer must be shown, else there is no error apparent.

6. If the owner of a coal tippie promises a contractor executing a contract for masonry work in repairing the tippie, not to have car-

penters throw down old timbers of the tipple from any section of the tipple while the contractor is working at the masonry at a particular section of the tipple, and the contractor goes to another section of the tipple in work connected with his contract, relying upon such promise, and being ignorant that carpenters of the owner of the tipple are still engaged in removing old timbers, and the contractor is injured by a piece of timber being thrown upon him in the work of removal by the carpenters, the owner of the tipple is liable. But in the absence of such promise, the owner would not be liable, if the contractor knew that carpentry work was going on above such other section, though he did not know that the particular work of removing old timbers was being done, if he took no precaution to learn the character of the work being done.

Guernsey vs Lazaer.
Brannon, J.
From Brooke County.
Decree affirmed.
Syllabus.

1. In the separate estate of a married woman there is no estate in the husband to have possession and profits during the wedlock, and no curtesy initiate; no estate by curtesy until the death of the wife. A judgment against the husband is no lien, during the wedlock, on such supposed curtesy, and a conveyance by wife and husband of such separate estate cannot be fraudulent as to such demand though such conveyance may have been made with intent to keep the property from being subjected to the husband's debt.

2. A will sets apart in trust in the hands of an executor certain realty and directs its profits to be applied for the use of testatrix's husband during life with remainder over, and provides that neither the real estate nor its profits shall be bound for the husband's past or future debts other than respectable and comfortable support. This clause of exemption is valid and the husband's interest, under the devise in the profits, is not liable for his debts.

Charleston National Bank vs W. A. Bradford.
McWhorter, J.
From Kanawha County.
Judgment corrected and affirmed.
Syllabus.

1. Syl. 1, 2 and 3, Bank vs Boylen, 26 W. Va., 554, reaffirmed.

2. Usurious interest paid a national bank on renewing a series of notes cannot in an action by the bank on the last of them be applied in satisfaction of the principal of the debt. Driesbach vs Bank, 104 U. S. 52.

3. The remedy given by Section 5198, Revised Statutes U. S., for the recovery of usurious interest paid to a national bank is exclusive. Stevens vs Bank, 111 U. S. 197.

Peters vs Johnson, Jackson & Co.**Brannon, J.****From Ritchie County.****Judgment reversed, remanded.****Syllabus.**

1. A verdict in an action of trespass on the case resting, "We the jury find for the defendants," the plea being not guilty, is good.

2. Though in an action sounding in damages there is an order at rules for an entry of damages, yet a plea of the general issue, or other issuable plea, filed in term annuls that order, and the jury is properly sworn to try the issue, and not to inquire of damages.

3. The general rule is that damages for which a party is liable are such, and only such, as are the reasonable and probable consequence of his acts.

4. Only the parties to a contract can sue for damage from its breach; but where in executing it things of imminently dangerous character are used, from which injury may probably happen to others, the law places him who executes the contract under duty to so perform it as not injure strangers to it, and such strangers may sue for damage coming to them from its negligent performance.

5. Apothecaries, druggists and all persons engaged in manufacturing, compounding or selling drugs, poisons or medicines, are required to be extraordinarily skillful, and to use the highest degree of care known to practical men to prevent injury from the use of such articles and compounds.

6. Where a merchant sells a poisonous drug to one person for a medicine which is harmless by mistake, and it is taken for medicine, without negligence, by a third person, the seller is liable to such third person for damage resulting to him therefrom, notwithstanding there is no privity of contract between the merchant and such third person.

Bank vs Prager & Son.**McWhorter, J.****From Wood County.****Affirmed.****Syllabus.**

1. A bill in equity to enforce a legal claim under Section 1, Chapter 106, Code, which distinctly attacks a general assignment by the defendant as fraudulent and made with intent to delay, hinder and defraud his creditors, and prays that the lien of attachment of plaintiff be established and enforced and for general relief, is good on demurrer, and an amended and supplemental bill may properly be filed containing further allegations of fraud and conspiracy in making the assignment, and sale by the trustee thereunder of the assigned property, with prayer that both the assignment and sale by the trustee be set aside as fraudulent and void.

2. Syllabus, p. 5, *Bank vs Parsons*, 42 W. Va., 137, is not applicable in a suit to set aside a gift, conveyance, or transfer, etc., as fraudulent under Section 1, Chapter 74, Code, and in which the question of unlawful preference is not involved.

3. When a bidder is paid a consideration to refrain from bidding on the property of an insolvent debtor in order that the purchaser may obtain it at a reduced price, it is a fraud upon the rights of creditors.

4. When evidence is introduced in a cause to which there are objections and exceptions taken and a decree rendered without the court passing upon such objections and exceptions, and there is sufficient legal evidence in the cause, together with the facts and circumstances of the case to justify the decree, the same will not be reversed because the court may have considered at the hearing the evidence so objected and excepted to, or because it failed to pass on such objections and exceptions.

Ward & Co. vs County Court.

Brannon, J.

From Taylor County.

Mandamus awarded.

Note by McWhorter filed.

Syllabus.

1. Chapter 44 of the Acts of 1899 give to the council of the city of Grafton exclusive power to grant or refuse license to sell spirituous liquors within that city, regardless of the action of the county court, and the provision of the act that the county court shall grant state license after the council has granted such license is mandatory upon the county court.

2. The provision of Chapter 44, Acts 1899, that the council of the city of Grafton shall have exclusive power to grant liquor licenses within it, is not repugnant to Section 24, Art. 8, of the Constitution, or any other clause therein.

Barrett vs Coal Company.

Brannon, J.

From Raleigh County.

Reversed and remanded.

Syllabus.

1. Where by a contract brick are to be made of certain kind and character "to the satisfaction of the general superintendent of said company or his authorized representatives," the right of rejection by the superintendent is absolute, and his reasons cannot be investigated, if in good faith, that is not fraudulent.

2. Where there is a contract for work, and it is only partially executed, and so no recovery can be had on a special count based on the contract, yet there may be recovery for the actual worth to the party of the work done upon a quantum meruit under the common count, if the failure to complete the work is without the fault of the plaintiff.

Kable vs Oil Company.**Brannon, J.****From Tyler County.****Reversed and remanded.****Syllabus.**

1. A laborer's lien against an insolvent corporation is not invalid because sworn to and filed in the county clerk's office after a suit to wind up its affairs and apply its property to creditors' debts has been instituted.

2. A laborer's lien on the property of an insolvent corporation does not lapse and become lost by failure to sue upon it within six months after filing the account, if within that time he files his petition to enforce it in a suit brought by one creditor for himself and others to wind up the affairs of the corporation and apply its property for payment of its creditors.

3. A suit by one creditor for all against an insolvent corporation; a report by a commissioner of various debts against it; an exception by one creditor to the allowance of a debt of another; a decree sustaining that exception and adjudging the debt no lien, but only a general debt, and recommitting the report to ascertain liens, debts, assets; such a decree is appealable as to the creditor whose debt is thus disallowed.

4. In a creditor's suit to convene the creditors of an insolvent corporation, a creditor whose debt, or its lien, is by a decree disallowed, may appeal without awaiting further action of the court as to debts of other creditors.

Isner vs Kelley.**McWhorter, J.****From Barbour County.****Affirmed.****Syllabus.**

1. F. devised to J. and H., sons of his daughter C., one hundred acres of land, describing it, "Upon the following conditions, viz: The said J. and H. are to take care of and provide for all of the reasonable wants of my daughter C. during her lifetime, provided she resides with them." Held: That such care and provision for all the reasonable wants of C. are a charge upon the land devised, and held further, under the provisions of the will it is a voluntary matter with C. whether she resides with the one or the other of her said sons; her residing with the one or the other is a condition precedent to his taking care of and providing for her wants, and, until he shall refuse to so care and provide for her, she has no cause of action against him.

2. There is no provision in the will for either of them to provide for her away from his home, and if one is to take care of her and keep her at his home and the other contributes to the expense thereof it must be by contract or mutual arrangement between them.

3. As long as one is ready and willing to take and care for C., it being a matter of choice with her as to where she will reside, he cannot be compelled to contribute to her support elsewhere.

Cautley vs. Morgan.
McWhorter, J.
From Kanawha County.
Reversed and Bill Dismissed.
Syllabus.

1. C. and M. & H. owned adjoining lots. C., desiring to build a business house on her lot and to make a party wall, an agreement in writing was entered into providing that such wall should be built to extend over on the ground of M. & H. ten inches only. C. without invoking the aid of M. & H. to assist in locating the division line or notifying them when she proposed to locate it, fixed the line herself with the aid of the city engineer and built the wall completing it in 1893, and in 1899, when M. & H. desired to use the wall, they discovered that it covered six inches more of their ground than was allowed by the contract. Held: that equity will not enjoin an action of ejectment by M. & H. against C. to recover possession of the said strip of six inches so built upon.

2. There can be no acquiescence without knowledge.

3. Mere silence or some act done where the means of knowledge are equally open to both parties does not create an estoppel in pais.

4. Silence will not estop, unless there is not only a right but a duty to speak.

Chancey, v. County Court.
McWhorter, J.
From Roane County.
Affirmed.
Syllabus.

1. An action in case for damages for injury to person or property against a county court under section 53, chapter 43, Code, may be maintained without first presenting a claim or demand therefor to the county court, under section 40, chapter 39, Code.

2. Syl. 2, in *Shrewsbury vs Miller*, 10 W. Va. 115, and Syl. 2 and 3 in *Ruffners vs Hill*, 31 W. Va., approved.

Coulter vs Blatchley.
McWhorter, J.
From Barbour County.
Affirmed.
Syllabus.

1. Under section 1, chapter 123, Code, an action at law or suit in equity may be brought against a non-resident of the State in any county of this State wherein he may be found or may have estate or debts due him, without regard to where the cause of action arose.

2. Where a parol contract is made by an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it, and parol evidence is admissible to enable the principal to show that he is the real contracting party.

3. Where in a trial before a jury there is any evidence tending to sustain the plaintiff's demand, the court should not strike out the evidence.

Town of Weston vs E. Balston.**McWhorter, J.****From Lewis County.****Affirmed.****Syllabus.**

1. In proceeding for judgment and award of execution on a forfeited forthcoming bond, the judgment should be for the true value of the property, for the non-delivery of which the bond was forfeited, with interest on such value from the date of the bond, and costs incurred in the proceeding; or for so much thereof as may be necessary to satisfy the demand against the defendant in the execution or warrant, with costs, by action or motion against the persons signing said bond.

2. Where property of the execution defendant has been levied upon at the instance of the defendant by the officer having the execution, and a bond given for the forthcoming and delivery of said property on day of sale and such bond is forfeited, such defendant will be estopped from the defense that such property was not subject to levy.

Hopkins vs Prichard.**McWhorter, J.****From Cabell County.****Affirmed in part, reversed in part and remanded.****Syllabus.**

1. In several suits consolidated certain tracts of land were attached by creditors as the individual lands of P. & B., a partner of P., who was not a party to the suits, filed his petition and answer, claiming these tracts were the property of P. & B., the causes were referred to a commissioner to ascertain and report among other things what real estate said P. owned and possessed and by what title held, and also what real estate B., a former partner of P. under the name of B. & P., was interested in. The commissioner took testimony in the matter, and without passing thereon referred the question to the court for decision upon the evidence certified up. The parties excepted to the report because the commissioner failed to report according to their respective contentions. The court overruled the exceptions of B., and decreed that the tracts held in the name of P., and of P., trustee, were the individual property of P., purchased with his individual assets, and not with the partnership funds of B. & P. for partnership purposes, and there was no resulting trust in favor of the creditors of B. & P. superior to the rights of the attaching creditors in the causes acquired under their attachment, but said land was first subject to the attachments; and directing the commissioner to carry out the former decree of reference accordingly, Held: The decree adjudicated the rights of B. and was appealable.

2 Syllabus pt. 6, Finley vs Finley, 42 W. Va. 372, does not apply to such matters as have been fully adjudicated by order or decree of the court, leaving nothing on the particular matter to be reported by the commissioner for the information of the court.

Garber vs Blatchley.
McWhorter, J.
From Barbour County.
Reversed and remanded.
Syllabus.

1. In an action for the recovery of money due on contract before a justice, a complaint in writing in the nature of a declaration in assumpsit with the common counts, the last count "Also in the sum of \$256.36, as stated in the account of the plaintiff against the defendant attached to and made part of this complaint," and averring promise and failure to pay, and which account attached is a complete bill of particulars of the items with date and amount of each and showing what the charge was for, with notice that it will be relied upon at the trial, is held sufficient under the statute.

2. Under section 5, chapter 138, a trial court has large discretion in granting new trials conditioned on payment of costs by the moving party, and the appellate court will not interfere unless it clearly appears that such discretion has been abused.

3. Where a new trial has been granted conditioned on payment of costs, the appellate court will not entertain an assignment of error on that ground, unless an exception was taken to the ruling of the court so granting it.

4. The *pendente lite* purchaser of a judgment rendered by a justice may continue to prosecute the claim in the circuit court in the name of his assigner, the plaintiff, when appealed to that court by the defendant.

5. Syl. 8, Boffelbower vs Detrick, 27 W. Va. 16; Syl. 3, Trust Co. vs McClellan, 40 W. Va. 406, and Syl. 3, Dewing vs Hutton, 37 S. E. 670, approved.

6. Neither the declarations nor the acts of a man can be given in evidence to prove that he is the agent of another, yet he is competent as a witness on the question of his agency.

State vs Gillilan.
Poffenbarger, J.
From Greenbrier County.
Reversed in part and affirmed.
Syllabus.

1. Courts of record have a discretionary jurisdiction, in case of conviction, for a gross common law misdemeanor, punishment for which has not been prescribed by statute, to require of the defendant sureties for good behavior. To this extent only the principles announced in State vs Gould, 26 W. Va. 258, are overruled.

2. Such jurisdiction does not exist when the conviction is for a statutory misdemeanor or a common law misdemeanor for which punishment is prescribed by statute.

3. The simple selling of intoxicating liquors is a statutory offense.

Bank vs Bellington Coal & Coke.**McWhorter, J.****From Barbour County.****Affirmed.****Syllabus.**

1. In the absence of actual fraud or mistake a court of equity will not interfere with a contract made between parties competent to contract.

2. Under Section 24, Chapter 53, Code, a mining corporation, after it is fully organized, may purchase real and personal estate for the use of such corporation and for its other corporate purposes and business at such price, upon such terms and conditions, as may be agreed upon by the owners and directors or stockholders of such corporation, and may pay for such property by issuing so many shares of its capital stock to the vendor as are equal in amount at par value to the price agreed upon for such property, but not to exceed its authorized capital.

3. The fact that property so received by a corporation in full payment for stock issued is taken at an over-valuation will not make the holder of such stock liable as for unpaid subscription until the transaction has first been impeached for fraud upon the corporation.

Fleming vs Railroad Company.**McWhorter, J.****From Marion County.****Reversed and remanded.****Syllabus.**

1. An action for obstructing a right of way over real estate is not barred by the statute of limitations in one year.

2. In an action for damages for obstructing a private way to entitle plaintiff to prove special damages for loss of business and custom the causes of the loss must be specially set out and the particular loss alleged.

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"Could a mechanic hold his position in a machine-shop who wasted time in carrying out his work, as a lawyer does in drawing a deed? Could he excuse himself from the modern methods of work by saying the method he uses had been followed from time immemorial? Could he disregard the uses of steam and electricity because his forefathers had done so? And yet we, the greatest of all professions, whenever we draw a deed or approve one are guilty of an act so absurd that our clients could not for a day retain in their employ a mechanic who was similarly stupid."

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THE BAR.

VOL. IX.

AUGUST-SEPTEMBER, 1902.

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THE BAR.

OFFICIAL JOURNAL OF THE

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An Open Forum.

This journal is intended to furnish an open forum to every lawyer for the discussion of any policy or proposition of interest to the Profession. It invites a free interchange of views upon all such topics whether they agree with the views of **THE BAR** or not.

THE BAR goes to every Court House in the State and is read by, probably, three-fourths of the lawyers of the State, and thus furnishes not only a ready medium of communication between members of the Profession, but of unification of the Profession on all matters of common concern, which is its prime mission.

Every clerk of a circuit court is the authorized agent of **THE BAR** in his county, and has the subscription bills in his possession, and will receive and receipt for all money due on that account, or for new subscriptions, and his receipt will always be a good acquittance for money due **THE BAR**.

THE BAR is furnished at the nominal rate of \$1.00 a year, which is less than the cost of publication, and we would like to have the name of every lawyer in the State on our subscription list.

ONLY that which means something can create a following and a healthy devil is more impressive than an angel that is down with nervous prostration,



IN a card in a Detroit newspaper a woman thus thanks an insurance company for prompt payment of her claims: "August 9 my husband took out an accident policy, and in less than a month was drowned. I consider it a good investment."



AN ambitious attorney's clerk was recently intrusted with the duty of drawing a statement of defense in an action for personal injuries, with strict orders that he was to deny everything. Afterwards, when his pleading came under the eye of his mentor, it was discovered that the faithful young man had denied, first, that the plaintiff was a gentleman, and, secondly, that the injured leg in question was the leg of the plaintiff.



THE vacation season is drawing to a close. The Summer is waning. The sear and yellow leaf will soon remind us of the advent of the "melancholy days" of courts, of clients, of the humdrum of business. We pity the lawyer who has not broken the "demnition grind" with a ramble in the mountains, or sported in the waves of the sea, or sat on the bank of the rippling stream and angled for the trout, and listened to the sighing of the winds and the singing of the birds; but must take up the work of the winter season without a break in the yearly routine. He will not be so clear and so fresh and so forcible as the fellow who has had an outing. Work and play are boon companions when brought together in the right way and ought not to become estranged by long separation.

THE Executive Council will meet in a few days to arrange the program and fix the date of the next annual meeting of the Bar Association, which is to be held at Wheeling. The next issue of **THE BAR** will give Members the result of the deliberations of the Council.



WE make our acknowledgements to the following named Circuit Clerks for recent favors:

W. H. Hoffman, of Elizabeth.

B. A. Flesher, of St. Marys.

J. D. Jones, of Glenville.

J. W. Watson, of Kingwood.

J. G. Mayfield, of Middlebourne.

H. M. Simms, attorney, of Huntington.



Inexcusable Barbarity.

THE expose of the barbarous conditions existing at our State Penitentiary, which we publish in this issue, ought to receive the attention of every citizen of the commonwealth. As the facts emanate from a member of the Board of Pardons, there can be no question but they reveal the real state of affairs. We assume also, that the Governor is in possession of these facts, and that he will at the proper time speak officially. But if there is, in any responsible quarter, any disposition to cover them up and pass them by, the people of the State will be heard. The Christian and humane sentiment of this State will not tolerate such conditions in one of its public institutions even when it is occupied exclusively by criminals.

We ask the readers of **THE BAR** to give this matter their attention, and see that it shall have the consideration it deserves at the next session of the Legislature,

The Lynchings in Randolph County.

IN connection with the recent lynchings in Randolph county Governor White has casually given an object lesson which is instructive, and we hope will not fail to convey the lesson it ought to teach.

He has offered a reward of \$300 for the fellow who did the killing and got away, and \$500 for those who lynched the suspects who did not get away.

In other words the price put by Gov. White upon the head of the original murderer is \$300, but upon those who took the law in their hands and murdered the murderer, the price was \$500.

We are surprised that the intelligent press should find any incongruity in this estimate of the crimes indicated by Gov. White in fixing the two rewards. Is the plain murderer who kills his man in the ordinary course to be put upon the same plane with the citizen who conspires with his neighbor not only to commit the same crime, but to do it under such conditions as will make murder popular; make murder a possible and prudent proceeding independent of the forms of law?

In other words, is it adding nothing to the crime of murder that the criminal proposes to substitute anarchy for law; to set aside the courts; to defy the officers of the law; to bring government into contempt; and to put every citizen's life and property in jeopardy of the mob?

We are glad to have a Governor of West Virginia who can draw a plain distinction between simple murder and murder mixed with anarchy. We are glad there is no confusion in the Executive mansion at Charleston on this point, even if there does seem to be some in the editorial chairs of the State press.

It would have been very unfortunate, in view of the trend of events, if the Executive of this State had disclosed a disposition and a purpose to put murder and anarchy on the same footing with simple murder. If we had any criticism to offer, we would

be bound to say that Governor White has erred only in making the distinction too small as indicated in dollars and cents; but we are satisfied that he has made it plain that the importance to the public of punishing the lyncher is about double that of inflicting the death penalty upon the individual murderer.

Randolph county cannot escape the deep disgrace that has besmirched her fair name, and the State of West Virginia must share it, if through the indifference or incompetency of the county and State officers the perpetrators of the recent acts of mob violence are not discovered and punished. Lynching is feeding and fattening upon immunity and the connivance of officers of the law and so-called-law-abiding-citizens. If the seed sown in Randolph county is not killed in the germ it will bear fruit in other counties. We believe that the present situation in its relation to lynching in this State will be epochal in its history. The people of the State are quietly looking on. They are waiting the end of this event. If the Randolph mob proves to be the master of the situation, it will serve as positive assurance to the populace of any other locality when the occasion for a display of mob violence arises.

The predecessor of the present Attorney General of West Virginia went into his office with one plank in his platform pledging him that no lynching should go unpunished under his administration. We hope the present distinguished incumbent has a missile like that up his sleeve or some place about his person.



TWO sappers in the Royal Engineers who were some time ago charged in a London police court with being drunk and disorderly set up as a defense against their arrest the fact that, as the constable approached them, one of them waved a white handkerchief attached to a stick, exclaiming at the time, "You cannot take me, I've got the flag of truce." The magistrate however, refused to take into account this recognized usage of war, and fined the prisoners 5s. each.

Keep Cool and Wait.

IN putting into operation the new plan of paying subscriptions for **THE BAR** to the Treasurer, by way of dues, it may be that in a few instances subscribers will have already paid their subscriptions to circuit clerks when the Treasurer makes his drafts.

If such cases occur this year subscribers may be assured that they will get due credit on the books for the over payment. It is hardly possible to avoid a little confusion this year, but it will not occur hereafter. In the future all members of the Association will be drawn upon by the treasurer for the \$4 annual dues and that will end it. No bills will be issued against members for subscriptions to **THE BAR**.

**Circuit Clerks.**

AS a matter of interest we would like to publish a full list of Circuit Clerks of this State who will stand for re-election, or who have received the nomination for the first time. Not all the counties have yet held their conventions, but thus far the following Circuit Clerks have been re-nominated in one or two instances by acclamation. Other Clerks receiving nominations will do **THE BAR** a favor by dropping us a postal card:

- G. Nelson Wilson, of Randolph County.
- J. G. Mayfield, of Tyler County.
- T. C. White, of Logan County.
- J. W. Watson of Preston County.

The Constitutional Amendments.

THE time is approaching when the voters of West Virginia will be called to pass upon the proposed amendments to the constitution.

THE BAR has endeavored to present these amendments in as full and fair a light as possible. We have nothing more to add. There is nothing we could say on any of these measures that would be of any benefit to our readers.

We have only this much to say in general:—That we believe it is the unanimous sentiment of the bar of the State that all the proposed amendments ought to be adopted. Of course there are those who differ from this position. But we do not believe any voter will go far wrong, who votes in favor of all. Some of the amendments are in the nature of urgent needs; and the main purpose of every one is in the nature of a response to a public demand that has been pressing for many years. The answer which the Legislature has made to these demands may not be the most complete and satisfactory, but it is far better than to remain *in statu quo* and the amendments if accepted will avoid the necessity of a constitutional convention and quiet the criticisms against our organic law for years to come



There is a Kentucky circuit judge who is a strong believer in his own infallibility. Not long ago, a bank official was convicted in his court of a misappropriation of funds, after a trial in which many technical points had been raised. He was remanded for sentence until the end of the criminal calendar should have been reached. On the night before judgment the prisoner suddenly expired in his cell. The next morning the court officer informed his honor of the occurrence.

"You will never have to sentence Smith," said the officer. "He has gone to a Higher Court."

"I bet," replied the presiding judge, "that the case will be affirmed."

Another "What Is It."

EDITOR BAR:

DEAR SIR:—I enclose you a sample of an instrument written by one of our Justices of the Peace. Whether it is intended for a deed of trust, a chattel mortgage or something else is more than any of us have been able to decide.

The spelling, etc., is as in the original, which was admitted to record. You may publish this instrument if you think it worth the space.

Yours very truly, *****

This deed made this 17 day of October 1901 between J W White and W W Hayes parties of the first part and W W Hayes of the second part all of the county of Mineral state of West Virginia witnesseth:

The the said parties of the first part for and in consideration of the sum of \$85.00 in hand paid receipt whereof is hereby acknowledged and in further consideration of the premises therein contained do grant and convey unto the said W W Hayes one dun horse, one black cow, one red and white spotted cow, one set of buggy harness, too red calves with a lined back, W W Hayes, with covenants of general warranty all that parcel of personally property lying and being in the county of mineral state of West Virginia in trust to secure W W Hayes the payment of a certain obligation bearing date on day of April 15 1902 for the sum of \$85.00 with intrest thereon at the rate of six per centum annum payable annually which said obligation is due and payable six months after date and failure to pay said interest annually when due principal of said obligation is also to become due said obligation was on 15 of April 1902 executed by said W W Hayes to said J W White or describe any other obligation according to the facts said W W Hayes is to permit said J W White of first part to remain in possession of said property hereby conveyed until default be maid in the payment intest of said obligation.

Witness the following signatures and seals.

J W White (Seal)

State of West Virginia,
Mineral County towit

I Jacob Puffenbarger a Justice of said county West Virginia do certify that W W Hayes whose name is signed to the writing hereto annexed bearing date on 17 day of October 1901 have this day acknowledged the same before me in my said county.

Given under my hand.

Jacob Puffenbarger
Justice.

Judge Jackson's Encounter With "Mother Jones" et al.

THE recent injunction and contempt proceedings under Judge J. J. Jackson, in connection with the striking miners in this State, have given rise to much press comment and much adverse criticism from the labor organizations.

It is not our purpose to go into a technical review of this case, or to express an opinion in support or opposition to the position taken by Judge Jackson; but in view of the importance of the case and the notoriety it has acquired, THE BAR deems it worth while to give an authentic summary of the points decided and the general grounds upon which the opinion of Judge Jackson was based.

Upon the filing of the bill for an injunction, and on the motion of counsel for the Guaranty Trust Company of New York, Judge Jackson awarded a temporary restraining order covering the following several points:

1. Inhibiting and restraining defendants and all others associated or connected with them from in any way interfering with the management, operation or conduct of said mines by their owners or those operating them, either by menaces, threats, or any character of intimidation used to prevent the employees of said mines from going to and from said mines and of working in and about said mines.

2. And the defendants are further restrained from entering upon the property of the owners of said Clarksburg Fuel company for the purpose of interfering with the employees of said company, either by intimidation, or the holding of either public or private assemblages upon said property, or in anywise molesting, interfering with or intimidating the employees of the Clarksburg Fuel company, so as to induce them to abandon their work in and about said mines.

3. And the defendants are further restrained from assembling in or near the paths, approaches and roads upon and near said property leading to and from their homes and residences to the mines, along which the employees of the Clarksburg Fuel company are compelled to travel to get to and from their work or from in any way interfering with the employees of said company in passing to and from their work, either by threats, menaces or intimidation, and the defendants are further restrained from entering the said mines and interfering with the employees in their mining operations within said mines, or assembling upon said property at or near the entrance to said mines.

or from marching near to or in sight of said mines or either of them, or the residences of the said employees.

4. The defendants are further inhibited and restrained from assembling together in camp or otherwise at or near or so near the mines of the Clarksburg Fuel company, or at or so near the residences of its employees as to disturb, alarm or intimidate such employees so as to prevent them from working in the mines or to prevent or interfere with them in passing to and from their work at the mines or in otherwise interfering with them as the employees of the Clarksburg Fuel company.

The fourth and last point in the list was the one to which the miners took special exception, and upon which they seem to think they have ground for impeaching Judge Jackson. If the threats of impeachment are intended to scare the venerable Judge, we are moved to say that the labor leaders do not know their man. Such a proceeding is like shooting paper wads at the man in the moon. Judge Jackson does not scare worth a cent. As to the validity of this fourth clause in the restraining order, it must be admitted that it is somewhat radical, and there might be a difference in the courts as to its propriety.

But the spirit of the order as a whole cannot be questioned. It is characteristic of the rulings of Judge Jackson in all cases that he goes after the bottom fact and is not very squeamish as to the method of getting there. His purpose was to prevent the strikers from interrupting the lawful business of the complainants, and he, with characteristic directness, proposed to inhibit everything of every kind that was designed to interfere, no matter under what guise it was couched, or under what semblance of individual rights the unlawful object was to be pursued.

If we had space we would like to give the reasons in full upon which Judge Jackson supported his decision. The following clauses taken from the opinion give the pith of it:

The consideration of this question ordinarily would involve the power of the court to issue injunctions in cases of this character.

This court, however, has heretofore upon repeated occasions recognized the power of the court to issue injunctions in cases where there is a combination and conspiracy upon the part of any class of people to prevent them from interfering with the business of others.

What is an injunction? Is it the exercise of an arbitrary power by the courts of the country, or is it a power that has been recognised from a very early date as one of the branches of administrative justice? I answer this question by affirming that the ordinary use of the writ of injunction is to prevent wrongs and injuries to persons and their property, or to re-instate the rights of persons to their property when they have been deprived of it. It is the most efficient, if not the only remedy to stay irreparable injury and to punish those who disobey the order of a court granting the writ.

In the language of the text writers, it is prohibitory and restitutory.

It is not the exercise of any new power by the court, but it is simply an application of the writ to a new condition of things that exists in our day by reason of the advancement in civilization.

It is a mistaken idea to suppose that the courts of this country abuse this writ. In my long experience on the bench I cannot recall a single occasion when any court, either Federal or State, ever abused in it what is known as strike cases. It is true that our courts have been criticised severely by persons who are inimical to the use of it, and have denounced the courts for "governing by injunction." But this criticism is so obviously unjust to the courts that it is unnecessary to enter into any defense of them.

In the case we have under consideration these defendants are known as professional agitators, organizers and walking delegates. They have nothing in common with the people who are employed in the mines of the Clarksburg Fuel Company.

The evidence in this case shows that their only object and purpose is to get the people, who are in the employment of the Clarksburg Fuel Company to go out upon a strike, as it is termed, for the purpose of compelling the owners of the mines to advance an increase in their wages.

It discloses that the miners in the Pinnickinnick mines are making an average of four dollars a day, in excess of their legitimate expenses, many of whom have worked in foreign countries for less than a half dollar a day.

The defendants in this case are not laborers in the mines, and have no connection with them whatever.

Their mission here is to foment trouble, create dissatisfaction among the employees in coal mines; producing strikes, which tend greatly to damage and injure the business of the employers.

In this case there is no dissatisfaction among the larger number of the miners, only a small part of them have quit the mines from fear of intimidation, threats and violence, but those remaining in the mines say they will quit work unless they are protected against the threats of these agitators and organizers.

The strong arm of the court of equity is invoked in this case, not to suppress the right of free speech, but to restrain and inhibit these defendants, whose only purpose is to bring about strikes, by trying to coerce people who are not dissatisfied with the terms of their employ-

ment, which result in inflicting injury and damage to their employers, as well as the employees.

So far I have only considered the power and authority of the court to award the injunction in this case. This brings me to the consideration of the question of contempt, and whether or not the defendants in this case have violated the injunction of this court.

It must be evident to every unprejudiced mind that the object and purpose of the agitators was to hold a meeting so near the mines of the Clarksburg Fuel Company, as to alarm and intimidate the miners that were at work in the Pinnickinnick mines and in the language of Mrs. Jones to get them "to lay down their picks and shovels and quit work."

It is in evidence that they rented an unoccupied lot to hold their meeting in the open air, where they all assembled and Mrs. Jones addressed the meeting. We must infer from the evidence what their purpose was. They were forbidden by the injunction "from assembling together in camp or otherwise, at or near or so near the mines of the Clarksburg Fuel Company, or at or so near the residences of its employees as to disturb, alarm or intimidate such employees so as to prevent them from working in the mines or to prevent or interfere with them in passing to or from their work at the mines, or in otherwise interfering with them as the employees of the Clarksburg Fuel Company." There can be no question that the defendants violated this clause of the injunction, for they assembled within one thousand feet of the tipples and opening of the mine, within three or four hundred feet of the residences of the miners and in about one hundred and fifty feet of the property of the Clarksburg Fuel Company.

It is further disclosed in the evidence that the miners in passing to and from their homes to the mines had to pass near the place where the meeting was held, which was within plain view of the mines.

And the evidence further shows that the noise and confusion created by the meeting could be heard distinctly at the mouth of the mines and where the tipples were; that those who were working in the mines were constantly sending out by the employees engaged in hauling the coal to the tipples, for news, which was carried back to the miners, creating more or less alarm, disquiet and intimidation to those working inside of the mine, and that "they were afraid of personal injury and being blown up."

As a result of this meeting quite a number of miners left their work, and other persons who were employed to take their places were prevented from doing so by this agitation and excitement.

I reach the conclusion that the defendants in this case, who were served with notice of this injunction have violated it, and have treated with contempt the order of this court.

As a consequence of their action this court will have to punish them for their contempt in violating this injunction.



At the trial of Hastings, Fox, struck by the solemnity of Lord Thurlow's appearance, said in an aside, "I wonder whether any one was ever so wise as Thurlow looks."

West Virginia Under Fire.

A FEW days ago the writer was sauntering about the office of a great hotel in the East, and overheard a remark between two of the guests who seemed to be discussing a topic of mutual interest, that would have caught the ear of any West Virginian and caused him to listen.

We were impolite enough to take a seat within hearing distance of the two gentlemen and follow their conversation. The writer guessed that they were citizens of New York who had capital invested in West Virginia, and the subject of their conversation was *the system or want of system of land titles in West Virginia.*

We would be glad if the population of the whole State could have been auditors of that conversation. We had the privilege of "seeing our State as others see us," at least upon that particular topic. We would be glad to report the caustic criticism that was passed back and forth between these two sharp, intelligent business men upon this ubiquitous topic, if we could do it justice. We believe it would convert any antiquarian among our population who still believes in the hoary dignity of his verbose deed, to a more simple, convenient and marketable evidence of title. Moreover, we believe he would be impressed, as was the writer, that there is no greater drawback to the prosperity and development of West Virginia than the uncertainty, inefficiency, and complicated system of land transfers to which we cling, or at least, to which we submit.

This is not the first or only discussion and criticism we have heard on this subject between men who are coming into this State every day for the purpose of investing their capital in our resources or industries. The complaint is widespread and universal. And it is well founded.

There ought to be a remedy and a speedy one. The Torrens

system is the one which presents itself, and the one to which other states are rapidly resorting. It is no longer an experiment. It has proved itself to be a practical and easy method of simplifying land transfers and thereby enhancing their commercial value.

A committee of the Michigan State Bar Association recently made a report in favor of the adoption of the Torrens system, in which its advantages were set forth in so concise and forcible a manner, that we quote this summary of the report.

"The Torrens system substitutes for the present system of registering deeds a system of registering titles. Instead of an ever-lengthening list of deeds to be examined by a lawyer, whose opinion as to the validity of the title conveyed is often the purchaser's sole guaranty, is substituted a certificate as simple as a certificate of stock, showing on its face in whom the title is vested, and also all the liens or other interests existing in the premises in question. The correctness of this certificate is guaranteed by law.

"The evils of the present system are manifest, particularly in large cities and in the older communities. These are:—

1. Expense. The cost of the abstract, or its continuation, and the opinion of counsel thereon upon every transfer..

- 2 Delay. This may extend to several months, the time being spent in procuring abstract and deeds to fill the gaps in the chain of title and in negotiating as to claimed defects.

3. Insecurity. Errors may and often do exist in the abstract. They may and do also exist in the opinion of counsel.

4. The constantly lengthening chain of deeds to be examined constantly increases the expense, delay and insecurity.

- 5 These defects operate as a perpetual tax upon the holder of real estate, depreciate its value, and make it notoriously a 'slow' asset.

"Actual experience has demonstrated that the Torrens system will correct all these defects.

1. The expense of the initial registration does not exceed the cost of a single transfer under the present system. In all subsequent transfers the expense will be much less than now. In ordinary cases the total expense would not exceed two dollars.

2. Speed. In the generality of cases, the transfer or mortgage, including the examination of title, all may be completed within an hour.

3. The title is vested or quieted at every transfer; there is no long chain of deeds to be examined; the chance for error is eliminated; and the title, as transferred, is guaranteed not only by the seller's warranty but by the law.

4. The records are shortened. No deeds are recorded. The original or duplicate deed is filed and left with the registrar.

5. This safe, short and inexpensive method of transfer increases the value of the land and makes it a 'quick' asset.

"The principles of the Torrens system are:—

1. A public examination of title in the United States by a court of competent jurisdiction.

2. A registration of the title found upon such examination.

3. Issuance of a certificate of title.

4. Re-registration of title upon every subsequent transfer.

5. Notice on the certificate of any matter affecting a registered title. Claims not registered have no validity.

6. Indemnity against loss out of an assurance fund."

After a discussion of this subject by the association a resolution was adopted that the Michigan Bar Association indorse the principles of the Torrens system of land title registration, and respectfully request the legislature of this State to take action for the adoption of the same. Mark Norris' Esq., who made the report as chairman of the committee and is now president of the association, writes that William Carpenter, Esq., the present chairman of the same committee, will make a further report at the next meeting.

We will only add to the above summary, the suggestion that while we believe that the almost universal sentiment of the bar and people of the State would favor the substitution of the Torrens system, yet the only hope of its accomplishment is through the active efforts and agency of the State Bar Association. That body must initiate and mature the scheme, and it is incumbent upon that body, in view of the situation, that it shall at its next annual meeting, take the matter up right heartily and put the machinery in motion that will lead to the consummation of the result in the shortest possible manner.



Henry W. Paine, on being familiarly accosted on the street by a man whose face he did not recall, turned to him and said, with his usual dignity: "Sir, I do not recognize you."

"Why," replied the man, "you tried a case for me more than twenty years ago."

"Still, sir, I do not recollect."

The man looked at him earnestly: "Pardon me, sir, I took you for Mr. D."

Paine drew himself up to his full height. "Sir," he said, "I hope the devil wont make that mistake hye and bye."

Essentials of Constitutional Right of Trial by Jury.

THE Supreme Court of Missouri, in *State vs. Hamey*, March, 1902 (67 S. W., 620), passes upon a question of law of considerable importance and very general interest. It concerns the application of clauses of American constitutions which preserve or guarantee the right of trial by jury "as heretofore enjoyed" "or existing." In many of the States amendments of the constitution have been adopted, after statutory modifications of the jury system. The question not infrequently has arisen whether a constitutional provision preserving the right of trial by jury protects and perpetuates such features as may have been added or modified by statute. The purport of the Missouri decision in question is that a constitutional guaranty of jury trial comprehends only the original features of jury *trial* at common law, so that additional or special features, such as the authorization of the jury to fix terms of imprisonment, do not come within its purview. It was held that a provision of the Missouri constitution of 1875, guaranteeing the right of trial by jury "as heretofore enjoyed," secured to an accused the right to a trial by jury only as it existed at common law, notwithstanding the duty of assessing the punishment had theretofore been imposed by statute upon the jury as to crimes of the nature of which the defendant was charged.



"Guilty, or not guilty?" asked the court. "I don't know that I exactly understand the information," replied the bank president. "If it charges me with misappropriation of funds, guilty; if it says larceny, certainly not!"

A "Crowners Quest" of Ye Olden Time.

FROM Dr. Donald Churchill's interesting paper on "The Early History of Medicine in Rhode Island," we extract this ancient account of an accidental drowning and consequent inquest :

Town Paper 0282

"Mehitteble Sprauge of ye Towne of Providence aged Thirty Years or there aboute being Engaged Testifieth as followeth. That she upon ocation being ye : 14th of this Instant at the house of Ephraim pearce, and goeing from thence homewar () a little before the setting of the sunn heareing a sudaine noyse looked about and saw Hannah pearce ye wife of ye s () Ephraim runn donne the Hill to ye well and there pulled ou () Elizabeth pearce the Daughter of ye sayd Ephraim and Hannah () his wife, then this Deponant returned with speed to ye hou () of ye sd Ephraim where ye sayd Hannah had layd her sayd Daughter on ye Bedd, where this Deponant sayth to ye best of her understanding she found ye sayd Elizabeth pearce the Daughter of ye sayd Ephraim Aged about one yeare and halfe to be absolutely Dedd, tho this deponant and ye sayd Mother of ye sayd Childe did use what meanes they could to presearve life : but it could not be for ye Childe as aforesd was Dedd and further this Deponant sayth not Taken this : 15th of August 1679 before me

John Whipple, Assistant.

Here followeth the jurys Verdict. Our verdict is : Wee find that Elizabeth pearce the Daughter of Ephraim pearce and Hannah his wife, Aged aboute one yeare and a halfe or there abouts, Exadentally fell into the well and was overwhelmed in water and by the Providence of God Drowned. Here followeth ye names of ye Coroners Inquest.

Richard Arnold forrman
Leit John Dexter
Thomas Arnold
Epenetus Olney
Thomas Harris Jun.
John Tillinghast

Capt. William hopkins
Samuell Comstock
Samuell Winsor
Thomas Hopkins
Benjamin Whipple
Henery Austin

These abovesayd persons were Impanelled on a Coroners Inquest, to

make Enquiry into the Untimely Death of Elizabeth pearce, the Daughter of Ephraim pearce and Hannah his wife aged about one year and halfe, August the fivetenth one thousand Six hundred and Seaventy Nine.

Per me John Whipple, Assistant.



Qualities of Mr. Balfour's Oratory

From the American standpoint, Mr. Balfour is not a great or a pleasing orator. In him the house of Commons manner,—which a cynical observer has termed the worst manner in the world,—is abnormally developed. In America we are accustomed to our public men speaking with a fluency that tells of long training and careful preparation. In the House of Commons men speak with great deliberation because,—as the observer already mentioned has said,—a gentleman is always deliberate, and never in a hurry. The Englishman, when he addresses an audience, punctuates his words with many unnecessary and exasperating “ahs” and “uhs” and “ehs.” Mr. Balfour's favorite attitude in speaking is to grasp the lapels of his coat with both hands. His voice is strong and penetrating; it is often harsh; and sometimes, when he is vehement, it rises to something like a feminine scream. He is a tall, dark, wiry, muscular man who dresses well. He no longer “languidly sprawls.” His movements are graceful, without being affected. His speeches do not sound well to the man who has been used to American oratory, because of his provoking interpellations, and because he has a habit of reconstructing his sentences in the middle, but they make fascinating reading. They are models of style; simple, direct, effective; clear cut, convincing, cogent; remorselessly logical, intellectually something more than mere words or phrases. Always one feels that Mr. Balfour is moved by conviction, that he believes in his cause, that he champions it because it is a sacred thing. He once said of himself: “My mind is not made for the exposition of a bill on its first reading.” It tells in a sentence the character of his mind. The man who can explain in detail an elaborate bill, who can go laboriously through every paragraph of an intricate measure is, usually, a man too matter of fact to be gifted with imagination. It is said that Mr. Gladstone was the one man who could make a budget speech interesting, and that when he brought down the budget, the dulllest and most uninteresting topic to the average member, who was unable to understand the intricate figures, and had still less inclination to do so, the House was crowded to hear the old man eloquent invest such unromantic subjects as income and expenditure with the magic of his voice and the charm of his imagination until they quickened and become sentient things. Mr. Balfour has not this gift. He is best as a debater. In the heat of debate, speaking on the spur of the moment, he is always eloquent, always self-possessed, always ready to seize the vital point. He is bland, sarcastic, polite, but his speeches rarely wound.

In Re State vs. Battle.

TO THE BAR:

I have read with all-absorbing interest your comments in June-July number on the great North Carolina case of *State vs. Battle*, reported in 41 S. E. R. 66. You plunge into the abysses of logic and rummage the boundless wastes of poetico-history for weapons of criticism, and wield them, as one may say, cyclopedically. That is so. And yet, I cannot wholly assert that you make out a perfect case of consanguinal descent of Edward S. Battle, of North Carolina, from the Battle of Hood's great epic of "Faultless Nellie Gray." You could, meseems, have made out quite as good a descent for him from the Battle of Cowpens, or that he was near of kin to the reigning King of England—the S after his prenomen standing for Seventh; argal, etc. Nor can I see that the lineal connection really has any very direct leaning on the red hot practical question *sub judice* in the Carolina case.

You will recall that, after the lamentable calamity whereby Ben Battle was deprived of both his pedal appurtenances, the surgeons made him a pair of wooden legs, and that thereupon he presented himself before the aforesaid Nelly,

"to pay her his devours,
When he'd devoured his pay,"

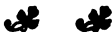
And that Nelly, upon that occasion, heartlessly remarked:

"Before you had those timber toes
Your love I did allow,
But then, you know, you stand upon
Another footing now."

All which shows, as plainly as some of the cases cited by our Supreme Court judges show the conclusion reached, that blood relationship has no place in the case under review, and that stands on "another footing."

The question is—can two fellows mutually assault each other? The answer is obvious: they can. The case shows that Battle and Powell did—actually did, and that settles it. But, was the Superior Court of Wake county right when it gave Battle 60 days geological practice on the public roads, and let Powell go, scot free? Aye, there's the

rub! No; there was no mutuality about that; and the Superior Court of Wake county cant be a very superior court or it wouldn't have decided that way. So the Supreme Court Wake-d it up to a realizing sense of duty by remanding the case. DE MINIMIS.



Jeopardy in a Justice's Court.

Bench and bar have laughed frequently over the story about the Irish justice who declared that he wouldn't hear the other side of the case because it had "a tendency to confoose the coort," but a prominent Fairmont lawyer, Mr. Wait Conaway, is regaling his friends with one that goes it better. Fairmont lawyers, and in particular Mr. Conaway, are fond of good stories, and the one just out is a fair sample of the brand. Mr. Conaway recently was called to assist in the trial before a justice, a son of the old sod, not far from Littleton, of some employes of a pipe line company or an oil company, operating in the community, who were charged with trespass. With an eye to securing as much sasety as possible a jury was demanded. The trial resulted in a verdict of not guilty, whereupon the court revolutionized practice by declaring that the verdict was then and there set aside, and the state granted a new trial. In spite of the expostulations of the learned counsel that it was against the constitution which provides that a man shall not be placed in jeopardy twice for the same offense, the court set aside the jury's finding. The second trial resulted in acquittal. The justice again set it aside, saying with all the judicial dignity possible:

"Misther Conaway, Oi hev been a justice of the pace in this deestrick for nigh onto thirty years, and the constytooshun has given me more throuble than any other wan thing. I have always been doubtful about it, an' so far as it applies to this case, the coort is of the opinion that it is incorrect. Therefore I'll set this verdict aside and grant the sthate another new trial."



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A Remedy Needed.

THE BAR:

Recce y an editorial, written by a member of the Board of Pardons, ed attention to a crying evil in the equipment of the State Penitentiary at Moundsville. No doubt progress has been made in the equipment and arrangement of prisons since the West Virginia Penitentiary was built, but whatever the origin may have been of the arrangements described in the editorial referred to there can now be no excuse for their continuance for a day beyond the time when the Legislature can meet and make provision for such care of the prisoners as will not close the door of hope to them. Torture should not be thought of in connection with imprisonment and yet torture is now in effect its result. The training for better things and an honest useful life should be possible to the prisoners, yet how can they be reached under the conditions described below. No doubt the officers of our State Administration from Governor down will welcome and aid the much needed change. With the desire that possible members of the Legislature and every other well meaning citizen may read and carefully consider it I ask you to publish the following editorial from the State Journal of July 10th, 1902.

C. D. MERRICK.

A REMEDY NEEDED.

The State Journal is at this time publishing some interesting matter about the State penitentiary at Moundsville. The institution is splendidly managed by Hon. C. E. Haddox, the Warden, and so far as he can make it so, is a model institution. Prisoners are treated by him like human beings, are well fed and well cared for in all particulars, save one. The government of the prison is in fact perfect and all things about it are conducted in a quiet and orderly manner.

There is one crying evil in connection with the penitentiary, however, that neither the Warden, the Governor, the Board of Directors, nor any one else connected with it, can remedy under the existing state of affairs and in calling attention to the matter, the State Journal is not reflecting on them, but instead is acting at their request—more especially the first named officer. It is a matter, which the press of the State should take up in the interest of humanity, and needs action by the Legislature, to secure the proper remedy. The remedy should be afforded not only for the sake of the reputation of West Virginia, but out of regard for the welfare of men, who while they are criminals are human beings, not devoid of sensibility, whose lives and health should be protected just as those of any other collection of unfortunate and unhappy people. The righting of what has long been recognized as a wrong and a piece of inhumanity in connection with the prison, can be the more strongly appealed for, for the reason that the penitentiary has for years been more than self-sustain-

ing, turning money into the State Treasury, instead of drawing it out.

The evil to which allusion is made herein is the condition of the cells occupied by the prisoners. Hundreds of these are piled three deep on each other, without adequate ventilation, dark, ugly, ill-smelling affairs, of insufficient size, holes which breed disease and destroy life. No one who has not seen them, can appreciate the horror of the situation. Think of the population of a good sized town, clustered on a few hundred feet of space, shut in by solid stone walls, forced into receptacles scarcely large enough in which to turn around and then imagine only half the horror of the situation.

The Warden himself says on this dreadful subject:

"The Institution has 585 cells, some 4 1-2 feet, some 5 feet wide, by 7 high and 7 deep, with which to accommodate 960 prisoners. The cells have no system of ventilation, no closets or wash bowls, and in 365 cells two men must be confined in each cell on an average of 13 hours a day.

The cells are entirely too small, too few in number, and are necessarily unsanitary, and the confinement of two prisoners in one cell is subversive of good discipline, good health, and good morals."

The human mind can scarcely comprehend all that is evil, embraced in the above few simple sentences. We talk about the crowded tenement houses of great cities with regret for their evils and condemnation of their existence, but there is no quarter in New York City, that has half the elements of death and doom in it, that there are in a place of small proportions to be found within the walls of the West Virginia penitentiary.

The remedy is with the Legislature as before intimated. The next one should act on this subject. A liberal appropriation should be made so that this terrible evil can be removed. It is a blot on the State. Room and ventilation must be afforded for the quarters of the thousand unfortunate creatures the commonwealth holds in durance for their misdeeds. Society and government owe something to their criminals. More, the State can not be cruel without necessity for it, to those who violate its statutes, without injury to itself. We owe it as a duty to ourselves, to act in such a matter as this.

The newspapers will be to blame, now that their attention is called to this subject, if they do not take up this matter and so influence public sentiment, that the next Legislature will be compelled to obey the voice of the people and take such steps as to put in effect the reform so much needed at the penitentiary. The press is the guide of public opinion and its power to influence the people almost unlimited. Here is a righteous cause; let it be advocated manfully.



There is nothing that makes a man so thankful he is married as to have his wife wake him up in the middle of the night to ask his opinion of a new idea she has for a shirtwaist.—New York Press.

A conductor on a Broadway car had refused to take a transfer the other day on the ground that it was too long after the hour punched. The passenger was politely told that under the rules he could not accept the transfer, and that he would have to pay his fare or leave the car.

"I'll not pay and I'll not leave the car," said the passenger savagely.

"I'll pay for you then," said the conductor, ringing up the fare. "I'd rather loose five cents than wrangle with a passenger."

This would doubtless have closed the incident had not the irate passenger seen Abe Hummel sitting opposite him. To him the irate one appealed to know if he was right or wrong in refusing to pay his fare.

"Do you wish my legal advice?" asked Mr. Hummel, with a show of gravity.

"I do."

"I never give legal advice without a fee."

"Well, here's a five dollar bill," said the passenger peeling off a bill from a big roll and handing it to Mr. Hummel, who promptly accepted it.

"My advice is—pay your fare or get off the car."

"Is that all?"

"No," replied Mr. Hummel. Then, calling the conductor and handing him the bill, he remarked: "It is certainly worth that much money to find and reward a gentlemanly conductor.—Phila. Times.



A New Hampshire judge has in his possession the following letter sent to him by an old farmer who had been notified that he had been drawn as a juror for a certain term of court:

Deer Jedge: I got your letter tellin' me to come to manchesster an' do dooty on the joory an' i rite you these few lines to let you know that you'll have to get some one else for it ain't so that I kin leave home now. I got to do some butcherin' an' sort over a lot of apples just about the time the joory will be settin' in your court. Si Jackman of this town says that he would soon as not go, fer he ain't nothin' else to do jest now, so you better send fer him. I hate the worst way not to oblige you, but it ain't so I kin at present. Eunnyhow I ain't much on the law, never havin' been a jooryman 'ceptin' when old Bud Stile got kyled by the cars here some years ago when I was one of that sat on the boody with koroner. So you better send for Si Jackman, fer he has got some kin in manchesster he wants to visit anyhow, an' he'd be willin' to go fer his car fare there and back. Anser back if you want Si.—Lippincott's.

Former Justice of the Supreme Court Daly and ex-assistant District Attorney Francis L. Wellman, counsel for the Metropolitan Street Railway Company, during an interruption of a case in which they were engaged on opposite sides were discussing the odd names of litigants in different suits.

"Take the famous case of *Bridges v. Shallcross*, reported in the Sixth West Virginia Reports, for instance," said Mr. Wellman.

"That case was most ordinary," said ex-Justice Daly, "compared with the truly remarkable case reported in the Arkansas law reports a few years ago.

"In that case a man by the name of Driver was tried for stealing five hogs belonging to a Mr. Pig. One of the witnesses was named Hamm, the prosecuting attorney's name was Chew, and the counsel for the defense were Miles & Miles.

"The oddness of the names occasioned much merriment in the court, which was brought to a climax when one of the counsel propounded the following question for the judge:

"If Driver drove Pig's hogs for Miles & Miles would Hamm be fit to Chew?"

"The court reserved decision."—N. Y. Times.



This old world hasn't time to stop
That it may learn your name;
It doesn't care a rap about
Your blue blood or your fame;
The only thing this old world cares
About concerning you
Is simply what this one thing, to-wit,
"Well, sir, what can you do?"



Over in Nicholas county the other day a young gentleman was driving along the road with what in Pendleton county is known as his 'best girl' seated contentedly beside him in the buggy. The horse had been allowed to select his own slow gait on the cool highway. The young man's arm had stolen gently around the young lady's waist, and there you had a picture of sweet content but seldom witnessed. Presently the couple became aware that a farmer passing along the road in the opposite direction was staring at them. The young gentleman in the buggy instantly flashed defiance at the intruder. "Rubber!" he cried sarcastically "Rub her yourself," quickly answered the farmer; "you've got your arm around her."

Implied Limitations Upon the Exercise of Legislative Powers.

ONE of the best disquisitions we have seen upon this topic was that given by Richard C. Dale, of the Philadelphia bar, at the last meeting of the American Bar Association. It will repay careful reading by every lawyer, and will be useful for reference by every practical lawyer on frequent occasions in his practice. We have not space for the whole paper, but give the drift of it:

This assertion of the subordination of the legislative power to a higher unwritten law of justice and right is not a modern suggestion.

It was the basis of the eloquent argument of James Otis, upon an application for a writ of assistance, made in *Paxtons Case* in 1763 before the Superior Court of Judicature for the Province of Massachusetts (Quincy Rep. 51; Note 464.)

We hear it repeated in our Courts to-day, whenever a statute involving a subject of public interest is under consideration, and runs counter to the established and cherished views of a minority, respectable enough to demand a hearing and sufficiently intelligent to picture the inconsistency between the primary and fundamental right and the objectionable statute by which such right has been invaded.

Whenever the legislature changes the older order—and public feeling is aroused upon a political, social, or economic issue—the party which fails before the legislature, is prone to appeal to the judiciary for a reversal of the legislative action.

Often the argument supporting such appeal is deduced from certain general clauses in the Federal Constitution, by which every State has been guaranteed a republican form of government, and the citizen is assured the equal protection of the laws, and warranted against deprivation of life, liberty and property without due process of law. But these clauses of the Constitution have received a settled judicial construction, limiting their operation to the protection of the States from the creation of imperial, monarchical or aristocratic forms of government as opposed to the republican form, and for securing to individuals enjoyment of life, liberty and property subject to an orderly and impartial administration of law.

When no help can be found in these general phrases, the judicial conscience is appealed to, as the ultimate guardian of the people's rights, and the argument is supported by venerable and high authority.

There is an old saying that "it is the part of a great judge to magnify his jurisdiction." This is often very persuasive, but it is a dangerous sentiment. It appeals to the intoxicating sense of

exercising supreme power. The judge who accepts the conclusion is promoted from the limited sphere incident to the ordinary administration of judicial work to the high plane of measuring the right and wisdom of legislation by his own individual standard of what is right, wise and in harmony with fundamental principles of natural justice.

It would be a great mistake, however, to assume that this broad view of the power of the judiciary is only presented by litigants who find themselves unable to sustain their position upon any surer foundation. It has the seeming support of the great names of Coke, Hobart and Holt; and the dicta of these sages of the law are referred to with not unjustifiable confidence as sustaining the power of the Court to abrogate any statute which to the mind of the judge clearly violates principles of natural right.

There are acts which the Federal or State Legislature cannot do, without exceeding their authority. There are certain vital principals in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power on which it is founded.

And in *Fletcher vs Peck* (6 Cranch 135), Mr. Chief Justice Marshall said :

"It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power. * * *

"To the legislature all legislative power is granted; * * * How far the power of giving the law may involve every other power, in cases where the Constitution is silent, never has been, and perhaps never can be, definitely stated."

In the argument of Daniel Webster in *Wilkinson vs Leland et al.* (2 Peters 647), is found the following passage :

"Though there may be no prohibition in the constitution, the legislature is restrained from committing flagrant acts, from acts subverting the great principles of republican liberty, and of social compact; such as giving the property of A to B. Cited 2 Johns. 248; 3 Dall. 386; 12 Wheaton 303; 7 Johns. 93; 8 Johns. 511."

And Mr. Justice Story in deciding the case said :

"In a government professing to regard the great rights of personal liberty and of property, and which is required to legislate in subordination to the general laws of England, it would not lightly be presumed that the great principles of Magna Charta were to be disregarded, or that the estates of its subjects were liable to be taken away without trial, without notice, and without offence. Even if such authority could be deemed to have been confided by the charter

to the General Assembly of Rhode Island, as an exercise of transcendental sovereignty before the Revolution, it can scarcely be imagined that the great event could have left the people of that State subjected to its uncontrolled and arbitrary exercise. That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expression of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well being, without very strong and direct expressions of such an intention."

I believe the bar of the United States recognize Mr. Justice Miller as the great expounder of the Constitution after the days of Marshall.

In *Loan Association vs Topeka* (20 Wallace 662) he said :

"It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism, * * *

"The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are of limited and defined powers.

"There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact would not exist, and which are respected by all governments entitled to the name."

These general remarks were in connection with the judgment that the exercise of the taxing power to aid a private business enterprise was in excess of the power delegated to the legislature to raise money by taxation.

So in case of the *Regents of the University of Maryland vs Williams* (9 Gill & J. 365) in holding that the legislature had no power to alter or amend a corporate charter without regard to the protection claimed under the prohibition of the Federal Constitution against any impairment of the obligation of a contract, C. J. Buchanan said :

"A fundamental principle of right and justice inherent in the nature and spirit of the social compact restrains and sets bounds to the power of legislation, which the legislature cannot pass without exceeding its rightful authority. It is that principle which

protects the life, liberty and property of the citizens from violation in the unjust exercise of legislative power."

The early Connecticut cases are interesting because until 1818 the State had no constitution except such as might be in the early charter granted by Charles II.

Its courts therefore had to consider the validity of legislative action unhampered by any expressed restrictions except those contained in the Federal Constitution.

In *Goshen vs Stonington* (4 Conn. 209), it was said:

"With those judges who assert the omnipotence of the legislature, in all cases, where the constitution has not interposed an explicit restraint, I cannot agree. Should there exist, what I know is not only an incredible supposition, but a most remote improbability, a case of the direct infraction of vested rights, too palpable to be questioned, and, too unjust to admit of vindication, I could not avoid considering it as a violation of the social compact, and within the control of the judiciary. If, for example, a law were made, without any cause to deprive a person of his property, or to subject him to imprisonment; who would not question its legality, and who would aid in carrying it into effect?"

Again in *Welch vs Wadsworth* (30 Conn. 155):

"But the power of the legislature in this respect is not unlimited. They cannot entirely disregard the fundamental principles of the social compact. Those principles underly all legislation, irrespective of constitutional restraints, and if the act in question is a clear violation of them, it is our duty to hold it abortive and void."

And in *Wheeler's Appeal from Probate* (45 Conn. 315), after referring to the broad powers of the legislature in that State, which is said to be "unrestricted in power and as omnipotent in a legal sense as the British Parliament," the Court concludes in these words:

"If then an act of the State legislature is not against natural justice, or the National Constitution, and it does not appear affirmatively and expressly that there is some provision in the Constitution forbidding it, we must hold it to be *intra vires* and valid."

Indicating that there are certain undefined limitations resting on natural justice which the courts will enforce when the occasion arises.

But, notwithstanding the great names invoked to support this doctrine, it has been rejected by the courts in this country with great unanimity, whenever it has been necessary to make it the real ground of a decision; and an examination of the cases from which the opinions just quoted are taken shows that if there was really an intention to assert that the judiciary have power to annul a statute because violative of the principles of natural justice and apart from express constitutional restriction, the remarks were *obiter dicta*.

It has been questioned whether Lord Coke ever intended to assert the doctrine as one defining the constitutional power of the judiciary as against the legislature, but that he rather meant to

state a rule for the guidance of the court in the construction of statutes which upon first reading might appear contrary to common right and common sense. All would agree that it is the duty of the court in applying a statute to assume that the legislature intended to prescribe rules of conduct and action which would be in accordance with principles of natural justice and the dictates of common sense, and hence that a judge should be astute to find a construction of the words of the statute which would not do violence to these principles. It would appear that Lord Coke in later utterances gave this meaning to his words in *Bonham's case*. (See notes to *Paxton's case*, Quincy's Rep. 474. Appendix I J).

This view has the approval of Chancellor Kent, who remarked in *Dash vs Van Kleeck* (7 Johnson [N. Y.] 502):

"A statute is never to be construed against the plain and obvious dictates of reason. The common law, says Lord Coke (8 Co. 118 a), adjudgeth a statute so far void; and upon this principle the Supreme Court of South Carolina proceeded, when it held (1 Bay. 93) that the courts were bound to give such a construction to a statute as was consistent with justice, though contrary to the letter of it."

His understanding of Coke's doctrine is expressed in *People vs Gallagher* (4 Mich. 244), where, in referring to the great difficulty of defining with any degree of certainty what these natural rights are, it was said:

"No light can be thrown upon it by an examination of the English authorities. Parliament is omnipotent, and although it may pass a law in direct violation of every right of the subject, if the language is clear and incapable of construction, there is no court in the kingdom which has the power to pronounce it void. The extent of the power of the courts is the power of construction, which they will exercise when the law is expressed in doubtful terms, and this is all that is to be understood from the language of Lord Coke in *Dr. Bonham's case*, reported in the 8 of Coke R. 118 a."

Regard to this principle will save courts from any inconsistencies and will secure an administration of law tempered with wisdom and reason.

The South Carolina case, just referred to, is interesting and instructive. In 1788 a statute had been enacted prohibiting the importation of negroes as slaves and prescribing their forfeiture and a fine in case of violation. A family from British Honduras emigrated to South Carolina, bringing their slaves with them, and it was contended this was an importation of slaves prohibited by the statute. The Court held it was not within the spirit of the law, which was to put an end to the slave trade and the importation of negroes by residents of the State, saying:

"It is clear that statutes passed against the plain and obvious principles of common right, and common reason, are absolutely null and void as far as they are calculated to operate against those principles. In the present instance, we have an act before us, which, were the strict letter of it applied to the case of the present claimants, would be evidently against common reason. But we

would not do the legislature who passed this act so much injustice as to sit here and say that it was their intention to make a forfeiture of property brought in here as this was. We are, therefore, bound to give such construction to this enacting clause of the Act of 1788, as will be consistent with justice and the dictates of natural reason, though contrary to the strict letter of the law; and this construction is that the legislature never had it in their contemplation to make a forfeiture of the negroes in question, and subject the parties to so heavy a penalty for bringing slaves into the State under the circumstances and for the purposes the claimants have proved." (*Ham vs McClaws*, 1 Bay [S. C.] 93).

A similar statute in Pennsylvania, designed to prevent the forcible carrying of negroes from Pennsylvania for sale in other States, was construed by the Supreme Court of Pennsylvania in 1795, and the Court recalled and applied the felicitous illustration of Sir William Blackstone of the Bolognian Law against shedding blood in the streets. In construing a statute the consequences and effects of its construction must be weighed by the court.

"The more comprehensive exposition, so warmly expressed on the part of the State, reminds us of the attempt under the Bolognian Law mentioned by Puffendorf, which enacted, 'That whoever drew blood in the streets should be punished with the utmost severity,' that a surgeon who opened the vein of a person that fell down in the street with a fit, had incurred the penalty of the law. But after long debate, it was held not to extend to the surgeon." 1 Bl. Com. 60. (*Respublica vs Richards*, 1 Yeates, 480).

The language of Marshall, Story and Chase, and the Connecticut courts must also be read in the light of the question before the Court, and in connection with other portions of the opinions and judgments entered. It will then be seen that no extreme view of the judicial power to revise legislative action was maintained.

In *Calder vs Bull* the question was whether an act of the Legislature of Connecticut granting a new trial in a contested will case violated any constitutional right of the parties as an *ex post facto* law. The judgment of the Court was that such a statute was not unconstitutional. In this case the words *ex post facto* first obtained an authoritative definition, and were held not to be equivalent to retrospective; that retrospective legislation was not necessarily invalid, although every statute should be construed to be prospective, unless the legislative intent to make it retrospective was clear. The language of Justice Chase, when read with the context, may reasonably be regarded as intended only to assert the existence of constitutional limitations upon the legislative power. When that opinion was written the right of the judiciary to enforce even express constitutional limitations had not been firmly established. The opinion does show that Justice Chase had no doubt of the principles which were afterward established in *Marbury vs Madison*.

In *Fletcher vs Peck* the question was as to the power of the legislature to annul a grant of land under which title had vested and possession been taken. The court held that a contract executed,

and a statute purporting to annul the grant was unconstitutional, because it was a law impairing the obligation of a contract within the meaning of the expressed constitutional prohibition; and the language of Marshall well may have been intended only to state the principles controlling the relative functions of the legislature and judiciary in a constitutional government. This is not inconsistent with the doctrine that for a definition of the limitations upon legislative power, reference must be made to the written constitution, which is the chart and guide of the judiciary.

In *Wilson vs Leland* the question was the validity of an act of the Legislature of Rhode Island, confirming the title of the grantee of an executrix, who had sold the land of a decedent for payment of debts. The validity of the statute was sustained, and the remarks of Justice Story heretofore quoted were simply an historical review of the nature of constitutional government in England as continued in Rhode Island, where at the time of that decision, in 1829, there was still no written constitution, and the legislature was still exercising the legislative powers originally granted by Royal Charter. Under such conditions Justice Story was of opinion that the fundamental rights guaranteed by Magna Charta were recognized as continuing of force in Rhode Island; for the power to legislate granted by Royal Charter was in accordance with the laws of England; but the question of how far the judiciary might annul a statute when in derogation of these unwritten rights, did not really arise, as the statute was held to be in harmony with fundamental principles of right.

In the Connecticut cases the question was as to the validity of the retrospective legislation, particularly of legislation confirming a marriage which in its inception was unlawful, and the right of the legislature to make a law which might operate on antecedent legal rights, was affirmed. The remarks of the court upon the abstract proposition were therefore obiter dicta.

Having referred to some of the authorities which are relied upon to sustain the right of the judiciary to assume the protection of the community from unwise and oppressive legislation, even though no conflict be shown with express constitutional provision; it is proper now to state that the accepted view of the American courts is that the judiciary can only arrest the execution of a statute when it conflicts with the provisions of the written constitution and that the courts may not run a race of opinion with the law-making power upon points of right and reason and expediency. The possibility that the Legislature may enact unwise and unjust statutes does not carry with it the existence of a power in the judiciary to declare the unwisdom and correct the injustice. The exercise of a discretionary power, broad and comprehensive enough to meet the exigencies and wants of a great nation must carry with it the power to do both good and evil.

We have noticed the remarks of Justice Chase in *Calder vs Bull*. In the same case Mr. Justice Iredell expressed the other view :

"If, then, a government composed of legislative, executive and

judicial departments, were established by a constitution which imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact would be lawfully enacted, and the judicial power could never interpose to pronounce it void."

In an early case the Court of Appeals of New York stated the principles which have been adopted and enforced in nearly every State. We can do no better than to state its conclusions in its own words.

"Every sovereign State possesses within itself absolute and unlimited legislative power. It is true that as government is instituted for beneficent purposes and to promote the welfare of the governed, it has no moral right to enact a law which is plainly repugnant to reason and justice. But this principle belongs to the science of political ethics, and not that of law. There is no arbiter beyond the State itself to determine what legislation is just. * * *

It is perfectly natural and simple distribution of the governmental powers it is not within the province of the judiciary to pronounce any act of the legislature void. It may, however, acquire this right through an artificial distribution of those powers by means of the organic law. * * *

"To determine then the extent of the law-making power we have only to look to the provisions of the Constitution. It has, and can have, no other limit than such as is there prescribed; and the doctrine that there exists in the judiciary some vague, loose and undefined power to annul a law, because, in its judgment, it is 'contrary to natural equity and justice,' is in conflict with the first principles of government. * * *

"This power of determining what laws are expedient and just, which must of necessity be lodged somewhere, may be as safely reposed in the legislature which returns its power so frequently through the elections into the hands of the people, as in a judiciary. The remedy for unjust legislation, provided it does not conflict with the organic law, is at the ballot-box; and I know of no provision of the constitution nor fundamental principle of government which authorizes the minority, when defeated at the polls, upon an issue involving the propriety of the law, to appeal to the judiciary and invoke its aid to reverse the decision of the majority and nullify the legislative power. * * *

"I am opposed to the judiciary attempting to set bounds to legislative authority, or declaring a statute invalid upon any fanciful theory of higher law or first principles of natural right outside of the Constitution. If the courts may imply limitation, there is no bound to implication except judicial discretion which must place the courts above the legislature and also the Constitution itself. This is hostile to the theory of the government. The constitution is the only standard for the courts to determine the question of statutory validity." *Wynehamer vs The People*, 13 N. Y., 428).

This is not the time or place to collect the mass of authority

which may be found in the Federal and State Reports in which the same doctrine has been applied.

A few general propositions may be stated which, with slightly varying language, have been announced in many courts, and may be confidently asserted to embody the accepted view of the law.

The fact that the action of the Legislature is unwise, unjust, oppressive or violative of the natural or political rights of their citizens, cannot be made the basis of action by the judiciary. It is no part of the business of courts to discuss the wisdom of legislation. However vicious in principle it may be, it is the plain duty of the court to enforce it, provided it is not in conflict with the written constitution. The motives of the legislators, real or supposed, in passing an act, are not open to judicial inquiry or consideration. With these the courts have nothing to do, being beyond their province, and such considerations are to be addressed solely to the legislature. The court is not authorized to sit as a council of revision to set aside or refuse assent to ill-considered, unwise or dangerous legislation. Their only duty and their only power is to scrutinize the act with reference to its constitutionality, to discover what, if any, provision of the constitution it violates. If the legislature should pass a law in plain, unequivocal and explicit terms within the general scope of their constitutional powers, there is no authority under our form of government to pronounce such an act void merely because, in the opinion of the judicial tribunals, it was contrary to principles of natural justice. To admit this power would be investing in the court a latitudinarian authority which would necessarily lead to collisions between the legislative and judicial departments, dangerous to the well being of society, and not in harmony with our theory of the division of the powers of government.

Courts cannot nullify an act of legislation on the vague ground that they think it opposed to a general "latent spirit" supposed to pervade or underlie the Constitution. To do so would be to arrogate the power of making the Constitution what the court may think it ought to be, instead of simply declaring what it is. The exercise of such a power would make the court sovereign over both Constitution and people, and convert the government into a judicial despotism. Whilst legislative power can only be exercised within the limits prescribed by the Constitution, the court is equally bound to keep within the sphere allotted to it by the same instrument. Judge Cooley, in speaking of limitations upon legislative authority, well says:

"Some of these are prescribed by constitutions, but others spring from the very nature of free government. The latter must depend for their enforcement upon legislative wisdom, discretion and conscience."

The supremacy of the legislature within the field of its constitutional powers does not derogate from the dignity and power of the judiciary in its appointed work.

Upon the State Legislature has been conferred the whole law

making power of the State except that which has been specially delegated to the National Congress. This law-making power, however, must be exercised subject to the limitations and prohibitions of the Constitution, which, as a permanent and paramount law settled by the deliberate will of the people as ultimate sovereigns curbs the will of the temporary majority and of the representatives selected to exercise the law-making power.

These constitutional restrictions it is the duty of the judiciary to make effective whenever a litigant asserts a right or defends his action under a statute passed in derogation of the Constitution; but this is not because the judiciary have any control over the legislative power, but because the act is forbidden by the Constitution, and the Constitution is the paramount law.

In England under the unwritten constitution Parliament might be regarded as the highest court. As the House of Lords was the supreme court of appeal in the course of orderly litigation, an act of Parliament, both Lords and Commons assenting thereto, might avoid the effect of a judgment at law.

In some of our colonies, even after the Revolution, the distinction was not always clearly made between the legislative and judicial functions. The legislature was sometimes regarded as the court of last resort, and in many of the States the County Courts exercised perhaps as many legislative as judicial functions. The distribution by constitutional enactment of powers of government among different departments is a comparatively modern idea. By the *de facto* separation of these powers in the practical administration of affairs, England showed to theorists the advantage of entrusting functions of so diverse a nature to separate bodies. This was made the subject of observation by Montesquieu before the middle of the eighteenth century, and the importance of making certain provisions for it in the organization of the government was the subject of earnest thought by Madison. (Federalist No. 47). But, now, by most of the State Constitutions, the theoretical separation of the legislative from the judicial functions is clear. Just what is the real line of demarcation, however, is not always easy of determination. The fact that the British Parliament may have repeatedly enacted statutes of a given character does not prove that the statute is legislative in character. It is, however, in harmony with this theoretic separation between the legislative and judicial function to observe that delegation of an express power to one department may be equivalent to the prohibition of its exercise by another department. (*State vs Staten*, 46 Tenn. 233). As a corollary to this courts of most conservative views have permitted inquiry into whether a particular statute imports the exercise of the legislative or the judicial functions. It is less difficult to state certain general propositions as to the character of legislative and judicial act than to draw with certainty the exact line of demarcation.

It has been well said that it is the province of the legislature to enact; of the judiciary to expound; and of the executive to enforce

(*Wyman vs Southard*, 10 Wheaton 46); and that a legislature cannot declare what a law was, but what it shall be (*Ogden vs Blacklage*, 2 Cranch 272); that the elements of judicial action as distinguished from legislative are that adverse parties litigate—private interests are involved—evidence of facts is to be received and weighed, and the facts are to be found—punishments are to be inflicted—forfeitures to be enforced; that legislation may affect rights incidentally—but cannot pass directly upon any question of controverted right. (*Flink Plank Road Co. vs Woodhill*, 25 Mich. 99). The precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily.

As illustrating the distinction between these powers it has been held that after property vested in an heir at law, a statute changing the law as to the probate of testamentary writings under which a will, invalid at the death of the ancestor, could be probated, was unconstitutional. It was not legislative as to precedent cases, it also violated the constitutional prohibition against taking property without due process of law. (*Greenough vs Greenough*, 11 Pa. St. 489).

While the legislature may not affect vested rights by declaring that a former statute has a meaning contrary to that, which is plainly written in its line; until the judiciary has fixed the meaning of a doubtful law upon which contractual rights have vested, it may be explained by legislative enactment; but where the construction is not doubtful, and particularly where it has been under judicial cognizance, no subsequent act, whatever shape it may take—as for example using the words “it shall be construed”—can affect or change previous rights already fixed and settled. (*Lambertson vs Hogan*, 2 Pa. St. 25).

The reason for the rule seems to be that pointed out by Chief Justice Gibson:

“A legislative mandate to change the settled interpretation of a statute, and uproot titles depending on past adjudications, or a legislative direction to perform a judicial function in a particular way, would be a direct violation of the Constitution, which assigns to each organ of the government its exclusive function and a limited sphere of action. A court could not be bound by a mandate to decide a principle or a cause in a particular way. Such a mandate would be a usurpation of judicial power, and more intolerable in its exercise than a legislative writ of error, because the losing party would be concluded by it without being heard.” (*O’Conner vs Warner*, 4 W. & S. 227).

An interpretation by one legislature of a statute written by another legislature years before would be an adjudication of the private rights which have arisen under it. A legislature has no authority to change the laws of language. If given language does not express a given meaning, the Legislature may use other language that does; but this will not change the meaning of the former language. In the very nature of language that is

impossible. (*Reiser vs The William Tell Saving Fund Association*, 39 Pa. St. 144).

But while the court may not by expository legislation affect vested property rights, it is well settled that curative and remedial legislation, such as that validating deeds and other muniments of title defectively acknowledged or recorded, or validating issues of municipal bonds when a popular vote has been informally taken, are proper exercises of the legislative power. (*McMullen vs Lee County*, 6 Iowa 391).

So a legislature unfettered by constitutional restrictions may exercise the power of confiscation.

In 1782 when there was no expressed limitation upon the legislature of Georgia, a statute was enacted confiscating the estates of persons guilty of treason, and this was sustained by the Supreme Court of the United States as a proper exercise of the legislative power. (*Cooper vs Telfair*, 4 Dall. 18).

Now the Federal Constitution and most of the State Constitutions forbid any bill of attainder, whereby corruption of the heritable blood may be affected, but the numerous cases arising during and since the civil war under the confiscation acts of 1862 show a continued recognition of the scope of the legislative power.

The courts may not declare a statute void, because of supposed repugnancy to the pervading spirit of the Constitution, it seems, however, that an act of the legislature can be declared void, though not transgressing the letter of any specific provision, because violating the spirit of the Constitution as deduced from that which is written. Yet such implied violation is exceptional, and must be made to appear beyond reasonable doubt.

It is illustrated in *Page vs Allen* (58 Pa. St. 338), when in referring to the constitutional provision that the executive power is lodged in a Governor, Thompson C. J. said:

"It would be manifestly repugnant to these provisions of the Constitution if an act of Assembly should provide for the election of two executives at the same election, yet it would be unconstitutional only by implication, there being no express prohibition on the subject."

It may be stated, as a rule, that the limitations which are enforced are those found in the express terms of the Constitution, or which arise by necessary implication from that which is expressed.

There is an interesting discussion of limitations to be implied from those which are directly expressed in *State vs Moore* (55 Nebraska 390), where, quoting Von Holst, the Court said:

"The legislative power of the State Legislature is unlimited as far as no limits are set to it by the Federal or the State Constitution." This does not mean, however, that these restrictions must always be expressed in explicit words. As it is generally admitted that the factors of the Federal government have certain "implied powers," so it has never been disputed that the State Legislatures are subject to "implied restrictions," that is restrictions which must be deduced from certain provisions of the Federal, or the State Constitution, or

that arise from the political nature of the Union, from the genius of American public institutions."

And further quoting Cooley on Constitutional Limitations, the opinion proceeds:

"It does not follow, however, that in every case the courts, before they can set aside a law as invalid, must be able to find in the Constitution some specific inhibition which has been disregarded, or some express command which has been disobeyed. Prohibitions are only important where they are in the nature of exceptions to a general grant of power; and if the authority to do an act has not been granted by the sovereign to its representatives, it cannot be necessary to prohibit its being done."

It may also confidently be said that American citizens living under the protection of the Federal and several State Constitutions do not need to invoke the protection of any doctrine of implied limitations upon legislative power.

There are express constitutional provisions which can be relied upon to protect us in all the fundamental rights of free men.

By the Federal Constitution the citizen is guaranteed the protection of habeas corpus; freedom from bill of attainder and ex post facto legislation; freedom in religion; the right to peaceably assemble and petition for a redress of grievances; to bear arms; to be secure against unreasonable searches and seizures; not to be required to answer for a capital or other infamous crime, unless on the presentment or indictment of a grand jury, and in all criminal prosecutions to enjoy the right of a speedy and public trial by an impartial jury, with safeguards in the trial of the presence of adverse witnesses and assistance of counsel for defense. These guarantees, when coupled with the comprehensive clause that a citizen shall not be deprived of life, liberty and property without due process of law, nor shall private property be taken for public use without just compensation, leave few imaginable cases, where natural rights are not directly within the protection of the written Constitution.

Similar guarantees are given to the citizen in his relation to the State by the several State Constitutions; and in many States numerous express limitations upon the legislative power protect the citizen in the undisturbed possession of property, and the exercise of all rights and privileges, which are regarded as the inalienable rights of freemen.

The courts have never shrunk from the duty of sustaining these expressed constitutional rights in all their vigor. The courage which induced John Marshall to say:

"That this court does not usurp power is most true. That this court does not shrink from its duty is not less true," has been the spirit not only of his successors in that high tribunal, but of the larger circle, who perhaps, not in the eye of the nation, but each in his own vicinage have administered the law without fear or favor; so that the roll of the American judiciary is one which the nation justly delights to honor.

While it may be true as an abstraction, that there are certain absolute rights, and the right of property among them, which in all free governments must of necessity be protected from legislative interference, irrespective of constitutional checks or guards; that protection in the absence of constitutional limitation must be found in legislative fidelity and adherence to the principles of free institutions. If recreant, an appeal to the people is the only remedy.

If it could be conceived that a legislature should enact a statute within the general powers of legislation, not violating any express provision of the Constitution, but abhorrent to the common sense of all right-minded men—there is no immediate relief against such a statute within the Constitution. Those who come within its operations are left to the last resort which the Anglo-Saxon does not rashly permit himself even to contemplate. Revolution is always at the responsibility of those who undertake it. Failure of all other remedies, and ultimate success alone, warrant the step. Happily the express limitations of our Constitution would seem to be an effectual barrier against any legislation, so abhorrent to common right as to arouse a sense of wrong inciting to this last mode of relief.

The assumption of authority beyond that of applying the terms of the written Constitution to each case as it arises, would be to place in the hands of the judiciary power too great and undefined either for its own security and permanency, or the protection of private rights. In no case should a judge oppose his own opinion to the clear law and declaration of the legislature so long as it acts within the pale of constitutional competency.

Courts of justice are said in the *Federalist* to be "bulwarks of a limited constitution designed to keep the legislature within the limits assigned to their authority." By applying to legislation the tests of constitutional limitations, it has been possible in our land to realize the workings of free representative government as stated by Guizot.

"Liberties are nothing until they become rights—positive rights formally recognized and consecrated. Rights, even when recognized, are nothing so long as they are not intrenched within guarantees. And lastly, guarantees are nothing so long as they are not maintained by forces independent of them in the limit of their rights. Convert liberties into rights, surround rights by guarantees, entrust the keeping of these guarantees to forces capable of maintaining them—such are the successive steps in the progress toward a free government."

But to enlarge the functions of the judiciary into a general power of reviewing the work of the law-making body, with no certain guide except considerations of right, equity and justice, as conceived by the reviewing court, deprives the community of the advantages of the division of legislative and judicial functions between separate bodies.

We may give our unqualified assent to the sentiment presented by Lafayette to the French Assembly.

"The end of all political associations are the preservation of the natural and imprescriptible rights of man, and these rights are liberty, property, security, and resistance of oppression. But the definition of the rules whereby liberty is to be enjoyed by each citizen without trespassing upon the rights of others, and how property shall be used so that it be not injurious to a neighbor, are matters which are strictly within the scope of the law-making power.

At common law, in the absence of legislation, the maxim

"Sic utere tuo ut alienum non laedas,"

may be sufficient to enable a court to guide a jury to do justice between citizens; but the ability of a court and jury to state and apply the common law, is not exclusive of the power of the law making body to modify the law or apply it to the changing conditions of a developing community.

The legitimacy of the laws must rest in the will of the law making body.

In the Bill of Rights, which is a part of the constitution of Ohio, is the following expression :

"Sec. 18. That a frequent recurrence to the fundamental principles of civil government is absolutely necessary to preserve the blessings of liberty." It should, therefore, not be forgotten that the powers of the judiciary, as well of the legislature, have their limitations.

The real and enduring power of the judiciary should not be impaired by a usurpation of powers, the responsibility for the exercise of which rests with the legislature. The interests of the public at large, as well as the rights of individual citizens, will be best conserved by always keeping clearly in view where the responsibility for unjust or unwise legislation rests. The supremacy of the legislature, so long as its acts do not contravene defined constitutional limitations, does not relieve it from the obligation to legislate in conformity with those rules of truth, reason and justice which, according to Guizot, constitute the true law. The difference between the view which is the accepted American view and that seemingly announced by Lord Coke, is, that such limitations upon the legislative power as spring from natural justice and equity and the principles of free government, must depend for their enforcement upon legislative wisdom, discretion and conscience. Supremacy of the legislature to legislate within the limits of its constitutional power does not mean irresponsibility. Legislators are representatives and agents with limited terms and must answer to their constituents—the people—for the exercise of the delegated powers. While the power of the legislature, subject to the expressed constitutional limitations, may not be questioned before judicial tribunals, the propriety of their acts may be reviewed on election day, and the sovereign may then review every departure from the all-pervading spirit of free institutions. We believe the judiciary can best accomplish its appointed work by turning a deaf ear to all arguments which seek to impose upon it the duty of revising the

work of the legislature, upon the plea that natural right, justice, equity, and the latent spirit of the Constitution and free government may control. Admitting such considerations would impose upon the courts a duty not judicial in its nature; the determination not of what the law is, but what it should be.

Judges are not selected with a view to any such duty. I do not say that many of them may not in fact be well fitted for its performance, but they are not chosen for it. The determination of what the law should be under our theory of government is for the people, speaking through their appointed representatives in legislature assembled.

The conclusion would seem to be: the law-making power has been entrusted solely to the legislature, and it is not responsible to any other tribunal for the exercise of its discretion. Through this body, the people express and make effective their desires for a change in the law, and when this is done in clear and unmistakable language, the judiciary have no duty to pass upon the wisdom or expediency of the statute. To assume such a duty is a usurpation of power, and an attack upon the integrity of constitutional government.

Fellow-members of the American Bar Association: We have all been sworn to support the Constitution of the United States and the constitutions of our several commonwealths. This Association is the representative body of the bar of the United States. Upon the fidelity of the American bar to sound views of government, in great measure depends the future of republican government. In one sense, the bar receives the law from the bench, but in a larger sense the law announced from the bench is that which the bench has received from the bar. In order, therefore, that the blessings of liberty may be preserved for us and those who may come after us let the bar at all times clearly distinguish between the legislative and judicial functions; let its influence always be exerted to perpetuate the high powers of the judiciary never encouraging any invasion of that field which the Constitution has entrusted to the legislature. Thus only will our government be perpetuated as "a government of laws and not of men."



A barrister asked Lord Mansfield when a certain case would be tried.

"Next Friday."

"Will you consider, my lord, that next Friday will be Good Friday?"

"I don't care for that," said Lord Mansfield, "the better the day, the better the deed."

"Well, my Lord, if you sit on that day, you will be the first judge who has done business on that day since Pontius Pilate's time."

WEST VIRGINIA COURT OF APPEALS.

Decisions Handed Down at the Last Term.

REPORTED SPECIALLY FOR THE READERS OF THE BAR.

Appearing Here For the First Time in Print.

Foley vs City of Huntington.
McWhorter, J.
From Cabell County.
Affirmed.
Syllabus.

1. In an action on the case for damages for personal injuries where there is conflicting evidence as to the facts supposed to constitute contributory negligence the question is one for the jury, and their verdict should not be disturbed unless it is clearly contrary to a decided preponderance of the evidence.

2. Point 1 Syl., Kay vs R. R. Co., 47 W. Va., 467, 35 S. E. 973, reaffirmed and approved.

County Court vs Hall.
Poffenbarger, J.
From Barbour County.
Reversed and remanded.
Syllabus.

1. A valuable consideration is the relinquishment by the promisee of some right which he may lawfully exercise or enforce, or the incurring of some risk or trouble at the instance of the promisor.

2. When a county court, in prosecuting a condemnation proceeding under chapters 42 and 43 of the Code, has made costs, and, upon the agreement of the landowner to pay the costs, dismisses the proceeding to take the particular parcel of land described and designated

in its application, the relinquishment of its right to retain the advantages gained in such proceeding and the risk of future costs and trouble it incurs by dismissing constitute a sufficient consideration for the promise to pay the costs, and they may be recovered in an action of assumpsit.

3. By such agreement and dismissal, the court does not act in excess of its powers, nor disable itself from establishing the road upon another location, and the contract is not illegal.

Roman Pickern, P. & D. E.,

vs

Coal River Boom & Timber Co., D. & P. E.

Dent, J.

From Kanawha County.

Reversed.

Syllabus.

1. Unless an act is wrongful in the sense of being unlawful, it will not sustain a suit for damages.

2. A citizen or corporation lawfully using a floating or navigable stream in a proper manner is not liable to a mill or other riparian owner for unavoidable damage or injury caused by such use.

3. The erection of a boom in a lawful manner for the purpose of catching and holding logs is a proper and lawful use of a navigable or floating stream.

4. Unless such boom be negligently, unlawfully or improperly erected or managed the corporation erecting or maintaining the same is not liable for any injury or damage occasioned thereby to others using the banks and bed of such stream for milling or other purposes.

5. Sec. 28, p. 1071, Code, created no new right in mill owners, but only placed the existing constitutional and common law rights of such riparian owners beyond judicial construction to the contrary.

6. The erection of a boom in such close proximity to a mill without consent of the owner thereof as to impede the flow of the water and thereby cause a deposit of sand and other sediment immediately below the dam of such mill, whether a natural fall or an artificial structure, in such manner as to destroy in an appreciable degree the water power of such fall or dam, creates an unlawful nuisance and renders the owner of such boom liable to the mill owner for the damages occasioned by the creation and continuance of such nuisance.

7. The measure of damages is the loss sustained by such mill owner during the continuance of such nuisance, and is to be ascertained by the rental or profit earning value of such property, as though such nuisance did not exist.

8. Permanent damages may not be given for the maintenance of a nuisance occasioned by an impermanent, movable or formable structure like a boom, but after a judgment obtained the continuance of such nuisance will subject the nuisancer to exemplary or punitive damages.

9. Whether a boom is in too close proximity to a mill dam depends on the fall of the stream and the effect that such boom has on the

flow of the waters above the same, and is a question of fact for the determination of a jury from the evidence produced.

10. A lessor who erects a boom in so close proximity to a mill dam as to injure the water power of such dam and thereby creates a nuisance against the same is equally liable with his lessee with notice for the continuance of such nuisance.

Smith vs Schlegel.
McWhorter, J.
From Pleasants County.
Affirmed.
Syllabus.

1. S. made his will as follows: "First, I do ordain that out of my personal property or the proceeds of the same that my debts justly due as well as my funeral expenses be paid. Second, after paying all my just debts as well as my funeral expenses, I give and bequeath to my beloved wife, R. S., the farm on which I now live in the county of Pleasants, State of West Virginia, containing seventy-one acres of land, more or less; also I give to my beloved wife, R. S., all of my personal estate of every kind, moneys, notes, claims and accounts included, that remain after paying my debts and funeral expenses, to be hers during her natural lifetime and to be disposed of by her as she may deem best for her comfort in life." Held: R. S. took the real estate in fee simple.

Turner v. Stewart.
From Wood County.
Reversed.
Brannon, J.
Syllabus.

1. A judgment or decree for a debt in favor of A against B is conclusive, both between the parties and as to strangers, of the existence, justness and amount of the debt, and can be impeached by a party or a stranger only for fraud or collusion. It can be impeached therefore, not collaterally, but only by direct proceeding to set it aside by original bill or cross bill or answer.

2. The right of a surety to be discharged in equity by extension of time given by the creditor is personal to the surety, and cannot be used by another creditor of such debtor.

3. A submission to arbitration of an existing controversy entered in court, or by an agreement out of court providing that the award shall be entered as the judgment or decree of the court, is not revocable, except by the court, and will bar a suit upon the demand submitted. But a provision in a contract that any future controversy under it shall be arbitrated will not prevent an action.

4. Where a bill in equity contains some matter proper for relief, a general demurrer is not proper, and there is no error in overruling it. The demurrer should be aimed specially at the improper matter. Where, however, after overruling such general demurrer, the court

gives relief only justifiable upon such improper matter, it is reversible error.

5. A surety having in his hands a fund which he may apply to pay the debt is not released by indulgence to the principal debtor by the creditor.

6. A surety will not be released by indulgence to the principal by the creditor in any case where it clearly appears that the act of the creditor has worked no real injury to the surety, as where the principal is notoriously insolvent at the time.

7. A submission to arbitration of a controversy pending in a suit not joined in by all interested in that controversy is void as to those not joined in the submission.

8. An award must have mutuality in its effect. If it will not avail one party to his benefit, it will not bind him to his prejudice in favor of another. An award does not avail or bind a stranger.

9. An award which is for any reason void does not merge or conclude a matter to which it relates,

10. A surety claiming release by indulgence to the principal debtor must prove that he is a surety. That burden rests on him.

11. An agreement by a creditor to submit his claim to arbitration, the award to be returned to court for judgment upon it, does not thereby release the surety who does not unite in the award.

12. An award is not of itself a lien on land. To make it a lien, or to give execution, it must be made the judgment or a decree of a court.

13. An award returned to court must be entered up as the judgment of the court, after rule or notice to the parties to show cause why it should not be entered as the judgment of the court, in order to constitute a lien, or have writ of execution.

14. The objection that a surety is released from a debt by reason of indulgence granted to the principal debtor cannot be made by mere exception to the report of a commissioner. The objection by a defendant must be made by answer or other proper pleading.

15. An answer not intended as a mere defense to the bill, but to affect the rights of a co-defendant, must make him a party, and call for relief against him upon its facts as in case of a cross bill; and process to answer it must be served upon that defendant.

16. A decree must have for its basis a proper pleading giving adequate facts to support it.

17. The doctrine of merger is not inflexibly applied in courts of equity. It will not be there applied to destroy the security of a decree as a lien, to the defeat of justice.

18. A judgment or decree will not be merged by an award upon the same original cause of action not made the judgment or decree of a court; but where the first judgment is the very subject of the arbitrament, it is merged and ended by an award whether carried into judgment or not.

19. Chapter 108 of the Code allowing an award to be entered as the judgment of a court is only a cumulative remedy, and does not take from its common law force, though not entered as such judgment:

Douglas v. Railroad Co

From Wood County.

Judgment reversed.

Brannon Judge.

Syllabus.

1. Compensatory damages cannot be recovered of a railroad company for breach of a covenant to construct and maintain necessary cattle-guards where the land owner fences off his remaining land on both sides of the railroad right of way, and the land between such fences occupied by the right of way is not used for stock, and the division line between the land of the grantor and an adjoining owner is partly unfenced, so as to allow cattle to pass from the adjoining owner to the land occupied by the railroad, and it is not shown that cattle have passed along the railroad either way through the division line, and no damages shown unless it be possibly extra labor to attend cattle passing over a private crossing at the division line, no outlay being shown.

2. Compensatory damages cannot be recovered of a railroad company for breach of a covenant to fence its track, when the land through which the railroad passes is used, not for stock, but only for cropping, and no damages shown otherwise than omission by the owner to graze stock on the land because of his fear of possible injury to it from trains, or loss of estimated profits by grazing over those from agriculture, which might have been realized, if fences had been made.

3. The statute of limitations will not bar action against a railroad company upon a covenant in a right of way grant to build and maintain a crossing or fence, the action being merely for such failure; but if actual damage result from such failure, then the statute will begin to run from the date of such damage in an action for compensatory damages.

4. An action for compensatory damages cannot be sustained against a railroad company for failure to build fences or cattle guards under an agreement to do so merely for such failure; there must be actual loss from such failure as its proximate cause.

5. Mere speculative and conjectural estimates of profits which might have been made, or the loss of gains and profits, which might have been made, are not a legitimate basis upon which to fix damages. 8 W. Va., 569.

6. Where a mere breach of contract is shown, without actual damage calling for compensation, nominal damages may be recovered from the mere fact of such breach of contract; but if compensatory damages are demanded for actual damage, the plaintiff must in some way show, by evidence, facts and data affording means by which a jury can safely ascertain and fix the amount of damages. A jury can not go by mere arbitrary conjecture or estimate. (39 W. Va. 196; 40 Id. 583.)

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OCTOBER, 1902.

THE BAR

We cannot destroy great combinations if we try, and we ought not to wish to do so.

The power to combine is one of the results of human development. The human race has acquired the capacity very slowly and will never relinquish it.

It is in vain to say that democracy is not fitted to exercise a regulative control over great combinations; this is only saying that democracy is not fitted to exist.

When a monopoly is created by a combination which controls the market it becomes the duty of the Government either to promote some new form of competition, or bring the monopoly under direct governmental supervision and control.

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WE will take it as a great favor if all Circuit Clerks who have subscription bills in their hands will report to us at once, and if any bills cannot be collected, to so endorse those bills and return them.



IN addition to the list of Circuit Clerks which we have already announced as receiving a renomination we have the name of R.W. McWilliams, of Huntington, who was renominated by acclamation. We hoped to publish a full list of those who would stand for re-election, but either very few of them have been renominated or they have failed to send us their names.



THE Torrens system of land registration is steadily growing in favor wherever it is being tried. It is only a question of a little time until all the States will adopt it, and then we will take a big laugh at the antiquated, cumbrous system we have endured so long. If the Bar Association does its duty at the next meeting, we can have the benefits of this system within a year or two in West Virginia.



JUSTICE GRAY left a vacancy on the Supreme Bench that is hard to fill both as to body and brains. His successor will not measure up to his physical proportions however well he may as a jurist. Justice Gray stood 6 feet 3 inches, and, as has been said, "was as broad as a door." Judge Jones is a man of spare body but of the average height. Justice Gray has left a large and permanent mark upon American jurisprudence, and his example as a learned, industrious, clear-headed and conscientious judicial officer will perpetually serve as an inspiration to the study and development of law as a science.

A Picturesque Lawyer.

THE death, a few days ago, of William F. Howe, of the firm of Howe & Hummel, New York, removes from the stage one of the most eccentric lawyers that has ever figured prominently in this country.

The eccentricities of Mr. Howe were his superficial stock in trade to make his personality conspicuous. They helped to advertise him. His white yatching cap in summer, his blazing diamonds all the year round and his flamboyant oratory in court in unimportant cases made him easily the most picturesque man of the criminal bar in recent years. Some of his noted predecessors had used similar means to advertise themselves. Mr. Howe's light comedy in cases that warranted it was spontaneous and entertaining. He enjoyed it, and his humor was genuine. He had the well-trained actor's ability to assume many parts, and in the days when Col. Fellows was District Attorney a contest of pathos, thundering eloquence or humor between these two men was more entertaining than any stage play. There was not a lawyer in New York city who tried more cases in which there was no prospect for a fee than Mr. Howe. Some of these cases he took from friendship and others for the pleasure he expected to get out of them or perhaps for the advertising that they might bring. His genuine legal ability was fully appreciated by the courts in which he practiced, but without his eccentricities of manner and dress he would not have filled as much space in the public eye as he did.

It is doubtful if a man could succeed at the bar by simply practicing these spectacular performances. Unless they were spontaneous the actor would be detected and lose caste. We have had but one example in the bar of West Virginia, of a lawyer who has used these means, and he is a successful practitioner, but as in Mr. Howe's case, his eccentricities are natural and original.

The Annual Meeting of the American Bar Association.

THE recent meeting of the American Bar Association was one of great interest and profit, as these annual meetings always are.

This is one of the most successful and well conducted organizations of the kind in the country. It combines work and play in a most pleasing manner. The social features are not the least attractive of its meetings, nor are they merely incidental; yet, at the same time, they are not allowed to overshadow or crowd to the background, some very practical and far reaching aims and ends that are constantly being brought forward and matured with great care, labor, and benefit to the profession and to the world. It is always instructive to read the proceedings of this body. It is composed of the very cream, the brains and the brawn of the legal profession, and it is a privilege and an honor to be on its roll of members.

The address of President U. M. Rose of Arkansas, was a very entertaining and suggestive paper. He dealt with the live and leading topics of the time. On the subject of trusts his remarks were wise, showing the dangers that threaten from lack of control, although not presenting anything original in the nature of a remedy. He pointed out the fact that they are not a new invention or product of modern business ingenuity. "Monopolies," said he are as old as human history, we cannot doubt that by their grinding oppression they kept men and women lying awake of nights long before the first page of history was written. They are forbidden by the laws of ancient Greece and Rome; they were forbidden by the common law of England, and the common law was reinforced from time to time by statutes. For awhile, during the reign of Elizabeth, they flourished. At one time she had licensed more than fifty

monopolies to prey on the community. Hume, the historian, was amazed at their number and rapacity.

"In order to build up an empire in the East parliament granted a monopoly to the East India Company, which became so oppressive that its overthrow was a matter of necessity. It soon learned to charge 400 per cent. profit on every article that it sold, and the tea that it sold became so inferior in quality that it had hardly a trace of the plant of that name.

"Of course, these results were not reached at once; prices were raised gradually and stealthily under pretense of decreased production.

"Instead of fifty monopolies we have at present more than 4,000, to say nothing of price and rate-fixing and profit-sharing pools, with buying and selling agencies, exercising functions similar to those of the trusts, all organized for the purpose of fixing prices arbitrarily. Every day brings its report of some new and gigantic alliance, the future of which cannot be predicted, since most of these corporations are authorized to buy up the stock of any other corporation so they may at any time acquire supreme control over industries extremely remote from those ostensibly in view when they were first created.

"The first success of one of these combinations, if successful at all, is alluring in a high degree. If the property is capitalized at half its value, the lowest capitalization known, and the securities are floated at par, the result is that former owners find themselves twice as rich as they were before, and at a very trifling outlay of time, money, or energy, to say nothing of a future of immense possibilities. We shall not be surprised, therefore, when told that many similar organizations are started with the deliberate intention of swindling unsuspecting stockholders.

"The Supreme Court of the United States and several of our Presidents have more than once called attention to the gravity of the situation, and we cannot suppose that men occupying

such high positions of responsibility would wantonly excite public apprehension.

"There is one form of tyranny that governments, however instituted, cannot—at least directly—exercise. Efforts have often been made to control prices by law, but never successfully. The natural laws of trade always triumphed over the artificial laws of men. But whoever can control the supply can fix his own prices, as we see in the case of Pharaoh in Egypt. It was not as King that he asserted that power, for the demand of supply would have given it to him if he had been a private individual.

"President Roosevelt has said more than once that the power of corporations over prices should be subjected to public control. The principal difficulty pertains to the remedy. If existing laws could be enforced perhaps no new ones would be needed."

On the subject of the law's delays, tending to destroy popular confidence in our courts, and for the purpose of accelerating proceedings and hastening the trial of cases, his views were original and impressive. He believes that the escape from the vast, intricate and imposing fabric of case law that we are piling up, as well as the delay in litigation there must come codes or compact systems of jurisprudence for each of the States that will answer the needs of every class of litigants, and that shall, like our statutory law, need only to be once interpreted by the Courts of appeal. When some one with industry and talent enough to perfect such a scheme shall appear, we will do him immortal honor.

He cited the fact that the attempt to codify the negotiable instrument law has been a success. In Great Britain it has been enacted as a law by parliament; it has been adopted by Congress for the District of Columbia; it has been accepted by the legislatures of twenty States, and bids fair to become, in a few years, the uniform law on this subject throughout the world.

Many interesting addresses on a variety of subjects were

made by able men, and the report of these when printed will make a valuable acquisition to the library of the lawyer and statesman.

The Association elected Francis Rowle, of Philadelphia, its President. The meetings of the Association were formerly held exclusively at Saratoga, but in recent years they have met there only every second year. The next meeting will be held at Hot Springs in Va., August, 1908, which will be a convenient point for visitors from our own bar.



One Amendment in Dispute.

THE school teachers of the State are not a unit on the proposed constitutional amendment, limiting the irreducible school fund. For example, at institutes recently held, resolutions were adopted either favoring or opposing it. In four of these, two, Boone and Jefferson counties favored it, and two, McDowell and Monongalia counties, opposed it. It is probable that there is less unanimity on this amendment than any other one of them. To the average voter, however, it would seem reasonable that a million dollars set apart as a school fund, independent of the annual tax levy, is a sufficient safety fund to secure the schools adequate support. The fair probability is that future generations will be better able to provide for the educational needs of the State than we are, and will be just as willing to do it. What we are contributing to this fund, however, is to help them. We get no benefit from it.



JUDGE R. M. BENJAMIN, of Indiana, has written a very able article in support of the right of a State under its policy power, to enact legislation to suppress strikes. We will refer to it more at length hereafter.

"Sin Is Not Imputed When There Is No Law."

THERE are a few simple propositions in relation to the much debated matter of the "Trusts" which, to the onlooker who is not influenced by party politics or personal interest, are easy, and offer a solution of the whole problem. These are:

1. That a so-called Trust may be made a public benefit; and it may be made a public evil.

2 Whether existing trusts are a public evil, or a public benefit we do not discuss, because that question is not in it; but if they are a public benefit they ought to have the protection of law, and if they are a public evil they ought to have the restraint of law. In either case, therefore, they need law—need to be under the supervision and control of law.

3. A modern trust exists in the form of a corporation, ushered into legal entity by the authority of a single State, and therefore having no legal existence outside of that state; but nevertheless doing business anywhere and everywhere; and in fact, having as its prime purpose a monopoly of its particular line of business throughout the United States—all this by virtue of its charter from a single State.

4. This is the essential and radical wrong in the constitution of the modern Trust. No charter issued to any corporation by any single State should be recognized as giving any kind of dignity or authority to any business organization to do any business beyond the borders of that State. Any other doctrine trenches on the rights of every other State as an independent sovereignty. The whole conception is farcical in its practical operation. That the State of Maine can authorize a few citizens in New York to go to Florida and monopolize a certain line of business there, as a legal organization, claiming a legal dignity, and disporting itself as somewhat independent to the

laws, or amenable to the Courts where it is doing business, is a very queer phase of governmental policy, to say the least.

5. The simple remedy, therefore, and the natural cure for all possible wrongs that may grow out of the Trust system, is to give Uncle Sam exclusive authority to charter any Corporation, Trust, or other venture that proposes, or shall have authority, to do an inter-state business. This is the natural and consistent policy, and the effectual plan of putting such organizations under the control of law. If Uncle Sam grants the charter it would be such a charter as Uncle Sam would adjudge to be for the public benefit, and with such checks and balances as would prevent it becoming a public evil. And it would put these organizations which stretch their arms out over the whole nation, under the supervision and control of the National government, as they should be.

The remedy is easy, natural, and effective along this line. But the most simple remedy is sometimes the most difficult to obtain.



In a hearing in the suit of Vantine vs. Hilands, that closed in Chicago last Saturday before a special commissioner of the Federal Circuit Court, it was alleged that Hilands made \$75,000 profit on a deal in certain steel stocks. But for the defendant it was alleged that out of this profit he had to pay \$24,771 to President Delafield "for a three minutes" interview with J. P. Morgan.

This price for time breaks all the world's records. An hour of the great merger-maker's time is, at this rate, worth \$495,420. An eight hour day of his labor as an interviewee would cost \$3,963,360, and to hold parley with him for a week would be worth \$23,780,160.

"Talk is cheap," but not with J. P. Morgan.

New Law Books.

THE enterprising firm of Keefe-Davidson & Co., St. Paul, have just issued a very attractive work on private corporations, in three large volumes. In both the typographical arrangement and the general mechanical effect of this new publication the publishers deserve great credit, to say nothing of its literary contents.

In this day of combinations in business, the laws of corporations take a first place in the lawyers' library, and we opine that this new, fresh, commodious, and comprehensive work will attract the Profession as a generous, well-served meal would a hungry crowd. New law books, well bound and mechanically perfect, are the most beautiful and substantial of all classes of books, and this new firm seems to have reached the summit of mechanical skill in making a law book. They have recently issued a number of new works which have come under notice as samples of the highest style in law books, not only in their workmanship but in the arrangement of the text, as well as in clearness and accuracy. Among these we note a very complete volume on Partnership, one on Insurance, and a very complete Encyclopoedic Dictionary.

Of the making of many books there is no end. Only a few years ago a new law book was a rarity, but today new law books are taking the lead, and there is no branch of the law that is not elaborately discussed in book form.



THE date of the next annual meeting of the State Bar Association, was fixed by the Executive Council on the two last days of the current year. There will be no courts in session in any part of the State, as it is during the holiday week following Christmas. The Wheeling bar will be prepared to entertain the whole Profession, and we will all be there with both feet. It will be the most notable meeting in the history of the Association.

A Jersey Judge's View of The Law of the Automobile.

IN New Jersey, recently, a case of a horse being frightened by an automobile and killing a man, the question arose as to whether there was any law to fit the case. Judge Dixon thereupon, charged the jury in somewhat forcible language that we think was as wise as it was forcible.

He declared that any person driving an automobile at the rate of speed alleged in this case was a common nuisance and should be indicted as such.

If in this case it appeared that driving the automobile at such speed was the probable cause of the man's death, then the guilty party should be indicted for manslaughter.

The Judge concluded: "I think it comes within the observation of everybody that these vehicles are abusing the privileges of the highways. The operators are not managing their vehicles with due regard for the rights of other people.

"We all have a right to the highway in our vehicles and on foot, just the same as we did before these machines came upon the roads.

"Everybody who uses the highways so as to endanger the people in the common use of it is guilty of creating a common nuisance.

"It is not a question of municipal ordinance; it is the law of the State. It does not depend on a statute; it is a common law, which we inherit from our ancestors.

"Everybody who so conducts himself as to endanger persons who are in the exercise of the common right is guilty of creating a common nuisance, and should be indicted for the same."



Make Receivers Run Mines.

The courts have not hesitated to take charge of public-service corporations and carry them on by means of receivers.—Boston Advertiser

When the Pilgrim Fathers Were Free.

THE trait which distinguished our pilgrim fathers chiefly was that they were sticklers for religious liberty.

That was what they were here for.

In this particular they carried their sovereignty under their hats.

When this mother country began to prescribe their religion, they quietly struck their tents and stole across the deep blue sea. Here they proceeded to jubilate over the discovery of a new world of religious liberty, where a man could say his prayers in his own way, under his own vine and fig-tree, according to the dictates of his own conscience, none daring to molest or make afraid.

Thereupon they promptly began to legislate and enact about religious tests, and prescribe mild prohibitions and penalties for slight departures from the orthodoxy of religious tolerance. Here are a few clauses from the decrees of the Plymouth Colony Code enacted in 1650, that it is profitable to review at this distance to see how far we have departed from the faith of the fathers and their broad minded liberty :

CAPITAL LAWS.

1. If any man after legal conviction shall have or worship any other God but the Lord God, hee shall bee put to death.

2. If any man or woman be a witch, this is, hath or consulteth with a familliar spirritt, they shall bee put to death.

3. If any person shall blaspheme the name of God the father, Sonne or holy Ghost, with direct, express, presumptuous, or high-handed blasphemy, or shall curse in the like manner, hee shall be put to death.

If any Christian, so colled, within this jurisdiction, shall contemptuously beare himself towards the word preached or the messengers that are called to dispense the same in any congregation, when hee doth faithfully execute his service, and office therein, according to the will and word of God, either by interrupting him in his preach-

ing, or charging him falsely with an error, which he hath not taught, in the open face of the church, or like a son of Korah, cast upon his true doctrine, or himself, any approach to the dishonor of the Lord Jesus, who hath sent him, and to the disparagement of that his holy ordinance, etc., shall for the first scandall bee convented and re-proved openly, by the magistrates at some lecture, and bound to their good behaviour: and if a second time they break forth into the like contemptuous carriages, they shall either pay five pounds to the publique treasure, or stand two houres, openly, upon a block or stoole foure foot high, upon a lecture day, with a paper fixed on his breast written with capital letters "AN OPEN AND OBSTINATE CONTEMNER OF GOD'S HOLY ORDINANCES," that others may feare and bee ashamed of breaking out into the like wickedness."



Lynching as a Contagion.

A CORRESPONDENT, who is well informed, in referring to the comments of The Bar as to the effects of the recent lynching in Randolph county says: "That lynching was the sequence of an unpunished lynching a year previous at Elkins. Our laws seem to break down in such cases where the enforcement depends on local officials subservient to and fearful of local sentiment and prejudice."

This is the bottom fact in a nut shell, and as the writer adds, is a "deplorable condition." There is no virulent disease more contagious than the crime of lynching. We predicted that this last lynching would be followed by another, but we did not recall that it had been preceded by another in the same locality.

Lawlessness of any kind grows by exercise. Every mob that has its will makes it easy to form another mob. Free rein to passion of any sort inevitably means demoralization and ruin. The sober sense of thoughtful and good citizens everywhere must recognize the evil, the disgrace, and the peril of allowing lawlessness to control a community. But not all have the courage to withstand the passionate purpose of the crowd.

Salaries of State Judges.

MR. C.D. MERRICK, of Parkersburg, W. Va., has made up a statistical table showing the salaries paid to judges of higher courts in the different States. Each amount given below is the highest judicial salary paid in the respective States. According to these figures, the highest salary paid to a State judge in this country is that of \$17,500 paid to the New York Supreme Court justices elected in the city of New York, and the lowest salary, in this list, is that of \$1,800, paid to the West Virginia Circuit judges. New York leads all the States, paying, in addition to the foregoing handsome salaries, a salary of \$10,500 to the chief judge of the Court of Appeals, and \$10,000 to the judges of that court. For second place, New Jersey and Illinois appear on equal terms, the former paying to her chancellor \$10,000 and an equal amount to her Supreme Court judges, while Illinois pays her Cook County Supreme Court judges either \$7,000 or \$10,350, just which appears uncertain from Mr. Merrick's figures. Then follows Pennsylvania, with a salary of \$8,500 to her chief justice, and salaries of \$8,000 to her Supreme Court judges. It is a close matter between Massachusetts, with a salary amounting to practically \$7,000 to her chief justice, and \$6,000 salaries to her Superior Court judges, and Michigan, with salaries of \$7,000 to her Supreme Court judges. Next comes California, with a salary of \$6,000 to her Supreme Court judges. Rhode Island and Missouri are on equal terms, the former paying her chief justice \$5,500, the latter her St. Louis Court of Appeals judges and Circuit Court of St. Louis judges \$5,500, and apparently expenses in addition. In a class by themselves are Colorado, with a Supreme Court salary of \$5,000; Minnesota, with a Supreme Court salary of \$5,000; Kentucky, with a Court of Appeals salary of \$5,000; Wisconsin, with a Superior Court salary of \$5,000; Nevada, with a Supreme Court Salary of \$4,500, Indiana, with a Supreme Court salary of \$4,500. In a class a bit below are Connecticut, Ohio, Montana, North Dakota, Iowa, Texas, and Washington, each with a top salary of \$4,000. In another class with top salaries ranging from \$3,800 down to \$3,000, are Delaware, Ala-

bama, Mississippi, New Hampshire, Oregon, Maine, Maryland, Tennessee, Florida, Arkansas and Georgia. Finally, with top salaries ranging from \$3,000 downward, come Vermont, Wyoming, Utah, South Carolina, Kansas, Idaho, Virginia, Nebraska, North Carolina and South Dakota. West Virginia apparently brings up the rear, with a Supreme Court salary of \$2,200.



The Causus Belli.

THE only proposed amendment to our Constitution that does not seemingly meet with universal approval, being the School Fund Amendment, we herewith append the full text of the amendment; in order that voters may more carefully study its terms and purpose. Its whole purport is simply to limit the accumulation of the irreducible school fund to one million dollars—not to distribute it. The fund which now amounts to one million dollars will be retained, and the interest on it, together with the taxes which heretofore have gone to swell that fund, will, if the amendment is adopted, go to the credit of the general School fund. You still pay your money but you have a choice where it will go. Here is the proposed amendment:

“Amendment section 4 of Article XII, and reading as follows:

“The accumulation of the School fund provided for in section four of Article XII, of the Constitution of the State, shall cease upon the adoption of this amendment, and all money to the credit of said fund over one million dollars, together with the interest on said fund, shall be used for the support of the Free Schools of this State. All money and taxes heretofore payable into the Treasury under provisions of the said section four, to the credit of the School Fund, shall be hereafter paid into the Treasury to the credit of the general school fund for the support of the free schools of the State.”

Defamation of Infants.

IN *Hurst v. Goodwin*, decided in the Supreme Court of Georgia in February, 1902 (40 S. E., 765), it was held, according to the syllabus by the court, that "an infant may, by his next friend, maintain an action for slander." This case is interesting because the questions discussed, while fairly well settled, are not very often actually raised in court. The following is from the opinion:

"If an infant is injured by the tortious conduct of another, and the effect of the injury is such as to deprive the father of the services of the infant, the father can maintain against the wrongdoer an action for whatever damages he may have sustained on account of being deprived of the services of his child. But this right of the father does not relieve the wrongdoer from liability for whatever damages accrue directly to the infant in the event the tort is one which resulted in damage to the infant. The above propositions are so well settled that it is useless to cite authority in support of them. It does not, however, follow that the right of action for injuries of every character to a minor child is in the father alone. If the injury is one from which the father does not sustain any damage—that is, which does not destroy or impair the ability of the child to render services to the father—there is no right of action in the father for the wrong done the child. The infant may maintain an action for damages on account of any tort committed resulting in damages to him, whether the tortious act affects the parent or not. As a general rule, the parent does not sustain damage from the defamation of his child's character, whether that defamation be oral or written: and ordinarily, therefore, the parent cannot maintain an action for slander or libel, against the defamer of his minor child's character. But in all cases wherever defamatory words are spoken or written of a minor the right of action accrues to the minor, and suit therefor may be brought by him through the medium of a guardian *ad litem* or next friend. If the defamatory words, whether spoken or written, are of such a character that in their effects they deprive the parent of the services of the child, then, under the principles above referred to, the father may maintain an action for the consequential damages resulting to him therefrom. But this would not affect the right of the infant to maintain an action for the damages accruing directly to him."

Oliver Wendall Holmes, Jurist.

President Roosevelt has appointed Chief Justice Oliver Wendell Holmes, of the Supreme Court of Massachusetts, to the vacancy on the bench of the Supreme Court of the United States caused by the resignation of Mr. Justice Horace Gray. The new justice is the son of Oliver Wendell Holmes, the poet, and was born in Boston on March 8, 1841. He graduated from Harvard in 1861, and almost immediately went into the army with the Twentieth Massachusetts. He served three years in the civil war and was wounded three times: in the breast at Ball's Bluff on Oct. 21, 1861; in the neck at Antietam on Sept. 17, 1862; and in the foot at Fredericksburg on May 3, 1862. On returning from the army he began the practice of law, and for twenty years he has been on the bench of the Supreme Court of Massachusetts, and during the last three years serving as chief justice.

Justice Holmes is known among his friends, and especially among his army comrades, as Captain Holmes, and the title, which was given to him in the army and imbedded in literature by his father, will probably stick.

When Captain Holmes was wounded at Antietam his father was immediately notified by telegraph, and began a search for him, the story of which was afterward told to the world in the pages of "The Atlantic." The story was called "The Hunt After My Captain" and Dr. Holmes begins it thus:

In the dead of night which closed upon the bloody field of Antietam my household was startled from its slumbers by the loud summons of a telegraphic messenger. The air has been heavy all day with rumors of battle, and thousands and tens thousands had walked the streets with throbbing hearts, in dread anticipation of the tidings any hour might bring.

We arose hastily, and presently the messenger was admitted. I took the envelope from his hand, opened it, and read:

"Hagerstown, 17th.

"To ——— H——:

"Captain H—— wounded; shot through neck; thought not mortal; at Keedysville.

"William G. Leduc."

"Through the neck"—no bullet left in wound. Windpipe,

foodpipe, carotid, jugular, half a dozen smaller, but still formidable, vessels; a great braid of nerves; each as big as a lampwick; spinal cord—ought to kill at once, if all. "Thought not mortal," or not thought mortal"—which was it?

Then began a search which, because of its anxiety, disappointments, hardships, and suspense must have been agonizing to the soul of the genial autocrat. He passed through Philadelphia and Baltimore, and taking a wagon and team at the latter place he pushed on to Frederick, and after many adventures and thrilling experiences reached Keedysville. But the anxious father was disappointed. His "captain" only a young man of twenty-one, had left for Hagerstown the day before in a milk cart. There was this consolation in the disappointment—the lad was alive. Then the trail was taken up again, and the unwearying searcher went back to Frederick and to Philadelphia, and then on to Harrisburg, but disappointment faced him again. He got this clew, however:

Lieutenant P—, of the Pennsylvania —th, was a very fresh, bright-looking young man, lying in bed from the effects of a recent injury received in action. He had good news for me. That afternoon a party of officers had passed through Harrisburg, going east. He had conversed in the barroom of a hotel with one of them, who was wounded in the shoulder (it might be the lower part of the neck), and had his arm in a sling. He belonged to the Twentieth Massachusetts; the lieutenant saw a captain, by the two bars on his shoulder straps. His name was my family name; he was tall and youthful, like my captain. At four o'clock he left on the train for Philadelphia. Closely questioned, the lieutenant's evidence was as round, complete, and lucid as a Japanese sphere of rock crystal.

The clew was delusive, as telegrams from various sources proved. But at last a message, which seemed reliable, came stating that the captain was really on his way from Hagerstown to Harrisburg. This is how Dr. Holmes describes the arrival of the train bearing his captain:

The train was late—fifteen minutes late—and I began to get nervous, lest something had happened. While I was looking for it out started a freight train, as if on purpose to wreck the cars I was expecting, for a grand smash up. I shivered at the thought, and asked an employee of the road, with whom I had formed an acquaintance a few minutes old, why there should not be a collision of the expected train with this which was just going out. He smiled an official smile and answered that they had arranged to prevent that, or words to that effect. The expected train came in so quietly that I was almost

startled to see it on the track. Let us walk calmly through the cars and look around us.

In the first car, on the fourth seat to the right, I saw my captain; there saw I him, even my firstborn, whom I had sought through many cities.

"How are you, boy?"

"How are you, dad?"

Such are the proprieties of life as they are observed among us Anglo-Saxons of the nineteenth century, disguising those natural impulses that made Joseph, the prime minister of Egypt and the house of Pharaoh heard—nay, which had once overcome his shaggy old uncle Esau so entirely that he fell on his brother's neck and cried like a baby in the presence of all the women. But the hidden cisterns of the soul may be filling fast with sweet tears, while the windows through which it looks are undimmed by a drop or a film of moisture.

* * * * *

The source of my repeated disappointments was soon made clear enough. The captain had gone to Hagerstown, intending to take the cars at once for Philadelphia, as his three friends actually did and as I took it for granted he certainly would. But as he walked languidly along some ladies saw him across the street, and, seeing, were moved to pity, and, pitying, spoke such soft words that he was tempted to accept their invitation and rest a while beneath their roof.

The mansion was old, as the dwellings of gentle folks should be; the ladies were, some of them, young, and all were full of kindness; there were gentle cares and unasked luxuries and pleasant talk and music sprinklings from the piano, with a sweet voice to keep them company—and all this after the swamps of the Chickahominy, the mud and flies of Harrison's Landing, the dragging marches, the desperate battles, the fretting wound, the jolting ambulance, the log house, and the rickety milk cart.

And as for his wound, how could it do otherwise than well under such hands? The bullet had gone smoothly through, dodging everything but a few nervous branches, which would come right in time and leave him as well as ever.

At last the captain reached home, where loving hands and hearts were eager to minister to him. This is how the happy father describes that home-coming:

Fling open the window blinds of the chamber that look out on the waters and toward the western sun! Let the joyous light shine in upon the pictures that hang upon its walls and the shelves thick set with the names of poets and philosophers and sacred teachers, in whose pages our boys learn that life is noble when it is held cheap by the side of honor and duty. Lay him in his own bed, and let him sleep off his aches and weariness. So comes down another night over this household, unbroken by any messenger of evil tidings—a night of peaceful rest and grateful thoughts, for this our son and brother was dead and is alive again, and was lost and is found.

Judges and Judges.

There are judges and judges. The nine justices of the Supreme Court of the United States are all white haired save one, and his name is White. He retains, with his youthful vigor, the black color of his hair, and he wrote his name away up by his opinions in the *Insular Cases*. Next on his left sits Justice McKenna, a thoroughly honest man, an able, faithful and painstaking judge, who during his short incumbency of the office, has done some excellent judicial work.

On his right sits Justice Brown, a man who is easily a judge laborious without struggling, he nevertheless labored so assiduously at his duties as entirely to lose the sight of one eye. The loss of it is not, however, observant even to a friend standing near him; and the fact that even to a friend he seems to have two good eyes must tend to diminish the affliction. He is by nature social and hospitable, but without a trace of ostentation. His wife died in Europe a year ago, and full mourning on his hat still announces his irreparable loss.

Among the colleagues of Justice Brown is an old college-mate, Justice Brewer. They were graduated from Yale in the same class, we have been told, and are very fond of each other. At the time when Justice Brewer was appointed he and Judge Brown were both candidates for the appointment; but when each heard that his old college friend was a candidate he refused to allow his own friends to press his own appointment. The two college-mates resemble each other in several particulars. — in the greatness of their intellectuality and in the sweetness of their natures. We heard a gentleman in a position to express a sound judgment upon the character of Justice Brewer say that he had all the intellectual greatness of the Field family, to which his mother belonged, without any of their angularities. His temper is sweet, responding readily to kindness and readily forgiving wrongs, especially if they are unintentional. As was said of the great Dr. Lushington, he "wears his weight of learning lightly, like a flower."

Justice Gray had a slight attack of paralysis last winter. According to the diagnosis of his physician, there was a congestion of blood in a portion of his brain, but no extravasation. He slowly recovered,

and before he could get back into the harness he persisted in receiving records, and doing such portions of the work of the court as he could do at home without hearing argument. In this way at the time of the present writing he is sitting in an easy chair three hours of each day doing his work against the protests of his colleagues, and bearing the orb of his fate.

Nothing which he could do in the span of life which yet remains to him could further build, finish or ornament the massive structure of the great judicial career which, during so many years, he has so laboriously built up. The greatest judge, we submit, that the processes of judicial evolution have yet reared in our country, not excepting Marshall. His persistency in continuing his work when he ought to be enjoying complete rest may be an illustration of the maxim that "knowledge comes but wisdom lingers." Justice Harlan, who sits at the right of the Chief Justice, is a man of giant stature built up in the limestone regions of Kentucky. His mind is as strong as his body. He has his own way of thinking, and when he makes up his mind upon any question he turns neither to the right nor to the left. The sentences of his dissenting opinions fall like the blows of a sledge hammer. Whether he is always sound,—in other words, whether we always agree with him—we always read his opinions with interest and satisfaction.

Justice Shiras has been called the bookworm of the court. He takes no delight in the social diversions of the Capital. Instead of being at a dinner where he might be expected, he will be found bending over a book. His learning is great; his sense of justice is strong. If he is deficient in any point, it is possibly in the power of exposition. He does not seem to be able to "wreak his thoughts upon expression," so to speak. But in most cases his opinions impress the reader as being sound, clear, just, and well fortified by judicial precedents.

On the extreme right of the court sits Justice Peckham. It is said that in amiability, sweetness of temper, he is the equal of Brewer or Brown; and he is a sound lawyer and strong judge, gifted with a good power of expression.

Chief Justice Fuller is the very pattern of courtesy and urbanity as a presiding judge. His ideas are clear and are expressed with ease and grace. He has written some of the most notable opinions of the court, and has founded an enduring reputation.

We have heard it said that in former days—in the days of Miller and Field and Bradley and Strong—the court was stronger than it is now. But perhaps this is merely the old, old story of “the good old times — old times were always good.” The court is now sound and strong. If it was very much divided in opinion in the Insular Tariff Cases, that was due to the novelty and to the inherent difficulty of the question which arose in those cases. The court might have been divided in much the same way. Certain it is that the judges do not divide according to political predilection. No political party has a ring in the nose of any of them. Field, though a Democrat in his political affiliations, was one of the greatest Federalists that ever sat upon that bench, not excepting Marshall. White, appointed by President Cleveland when sitting in the Senate of the United States as a Democrat from Louisiana, delivered a great opinion in the Insular Tariff Cases, upholding the position taken by the Republican administration. On the other hand, Brewer and Harlan, both Republicans in their former political affiliations—both appointed by Republican presidents,—took the view that the Constitution follows the flag, and that wherever the flag goes those principles of constitutional liberty and right imbedded in the Constitution and in several of its amendments, also go.—*Am. Law Review*.



The writer knows a well-meaning young justice who has a considerable marrying business and who, when he took the office, wrote out a nice little speech to be delivered to the bride and groom just before collecting the usual two dollars. This speech he can say backwards and forwards and begin in the middle and say it both ways. The other day he joined a couple in the holy bonds of matrimony and threw in the customary enthusiastic and inexperienced advice of a bachelor, free of charge. His peroration ran something like this:

“I hope you realize the seriousness of the important step you have taken. It shall be your duty, sir, to guard and protect and cherish; and yours, madam, to love and respect and obey. This is the greatest event that can happen in the life of either of you—an event that stands out as the pre-eminent event of your lives. Henceforth those lives will run together until one of you shall lay down the burden of life to cross the dark waters, and there wait for the coming of the other. You are now one through life, with one heart, one purpose, and one destiny. I hope and trust you realize all these things. I hope you understand the step you have taken.”

“I’d ought to,” replied the blushing bride “I’ve been married three times and divorced twice.”

Double Punishment Under Statute and Ordinance.

Where a municipal ordinance prohibits acts which are also penal offences under the State laws, questions of considerable difficulty arise. That such ordinances may constitutionally be passed is generally, though not universally, admitted. Cooley, Const. Lim., 6th ed., 239; cf. 1 Beach, Pub. Corp., sec. 510. Accepting their constitutionality may the same act be twice punished, once under the ordinance, and again under the statute? Some States hold that it may not; and that the act is punishable alone by that power which first takes jurisdiction. *Lynch v. Commonwealth*, 35 S. W. Rep., 264 (Ky.); see *People v. Hanrahan*, 75 Mich. 611. A recent Missouri case, inconsistent with earlier decisions in the same court, gives a contrary answer. *State v. Muir*, 65 S. W. Rep., 285; contra, *State v. Owan*, 29 Mo. 330. The defendant having been convicted and fined in the police court upon a complaint for violating a city ordinance against gambling, was indicted under a statute for the same act, and his plea of *autrefois convict* held no bar. The prosecution under the ordinance was considered merely civil proceedings.

This result, though not this reasoning, is in accordance with the weight of authority. Cooley, *supra*; *Hankin v. People*, 106 Ill. 628; *State v. Clifford*, 45 La. Ann. 980. It is usually argued that a single act constitutes two offences, one purely local, against the police regulations of the municipality, the other a violation of the public law. *Mayor v. Allaire*, 14 Ala. 400. An analogy is often drawn to the concurring jurisdiction of State and Federal Courts. See *State v. Ambrose*, 5, Ind. 351. This analogy, however, is unsound, for the municipality is not a distinct sovereign, its only power emanating from the State. A more satisfactory reason for allowing such double punishment is advanced when it is said that the constitutional prohibitions against double jeopardy were never intended to apply to conviction under a mere police regulation. *State v. Clifford*, *supra*. This view would seem to find support in those cases which permit conviction for a violation of the ordinance by summary proceedings, when, if the act were punished as a violation of the statute, indict-

ment and jury trial would be requisite. *Ogden v. Madison*, 87 N. W. Rep. 568 (Wis.); *McInery v. Denver*, 17 Col. 302.

The principal case suggests a third ground on which to support these decisions, namely, that the prosecution under the ordinance is not really a criminal proceeding. Such a view is not wholly without support. Where, as a common law, the enforcement of the ordinance is by an action of debt for the fine brought in the name of the city, the action is admittedly civil. 1 Dill., Mun. Corp., sec 410. But where, as is usual in this country, the proceedings is in the nature of a complaint, the character of the action is much disputed. The cases necessarily turn largely upon the particular wording of the State constitution and statutes. See L. R. A. 43, note. In general it seems to be held that if the violation of the ordinance is also a misdemeanor by statute or common law, the proceeding is criminal; otherwise it is civil. See *State v. Municipal Court of Milwaukee*, 88 Wis. 358. This distinction appears invalid. The character of the violation of the police regulations of the city is not altered by the criminality or non-criminality of the act under the statutes. The true test, it is thought, rests in the intention of the legislature in authorizing, and of the city in passing, such regulations. This is to be gathered from the nature of the act prohibited, the penalty imposed, and the method of procedure. If the purpose of the ordinance is to render reparation to the city by a fine, the proceedings, even though by complaint, may well be considered civil rather than criminal. On the other hand, if the object is to penalize the offender, it would seem that the proceeding to collect the fine, unless it be an action of debt, and certainly the proceedings to impose a penalty of imprisonment, would be of a criminal character. The statement of the principal case, therefore, that such proceedings are merely civil, would seem too broad; yet two convictions may be supported in such cases on the ground above suggested that the constitutional protection against double jeopardy was not intended to extend to punishment for violation of city ordinances.—*Harvard Law Review*.



"Many a man complains dat he can't get jestice," said a colored philosopher, "but ef he seen jestice comin' down de big road he'd take ter de woods wusser'n a jack rabbit."—*Ex.*

Meeting of the Executive Council.

A MEETING of the Executive Council of the State Bar Association was held on the 27th day of August, 1902, at Wheeling, in order to fix the date and prepare a program for the ensuing meeting of the Association. After conferring with the committee from the local Bar Association, the 30th and 31st days of December were selected as the date for the coming annual meeting.

This was done in the belief that the holiday season would afford unusual opportunity to the members of the Bar to attend what is hoped and expected to be the pleasantest and one of the most profitable meetings in the history of the Association.

The following topics were selected upon which papers will be presented to the Association:

First—The Torrens System: A Practical Bill for West Virginia and the reasons.

Second—House Bill 8316, Congress U. S. (Being the bill reforming and Codifying the Acts in Relation to Civil Procedure and the Jurisdiction of the Federal Courts.)

Third—Injunctions: What Legislation, if any, Should be had in Relation to them.

In the above topics the Executive council has endeavored to select those which present a vital interest to the profession and of a practical character. The paper on House Bill 8316 will be read by Hon. Alston G. Dayton, and it is hoped that the names of the remaining speakers, together with the guest who will deliver the annual address, will be announced in our next issue.



"I see that a Virginia judge has just given a man a year for stealing a straw hat from a store in the day-time," remarked the book-keeper.

"That's nothing," chimed in the draft clerk. "I knew a man to get five years for little more than that. It was in Wisconsin. A sudden rainstorm came up one day and the man took an umbrella."

"I thought that was justifiable larceny

"Ordinarily, yes; in this case, no. The 'umbrella was the court's."

The Hague Tribunal.

THE International Tribunal of Arbitration at The Hague is about to have its first trial in submission of a dispute between Mexico and the United States.

About two centuries ago, when California and Mexico were Spanish possessions, an endowment was made for the benefit of the Jesuits and other religious orders. After the Mexican Republic confiscated the religious properties a settlement was made, and the Mixed Claims Commission in Washington gave prolonged consideration to the evidence before it. The claimants at The Hague are various Roman Catholic bodies in California, who complain that payments of interest have been suspended by the Mexican Government since 1873, when the Commission finished its work. The claims involved amount to nearly two million dollars. The American and Mexican Government respectively selected two arbitrators from the lists of the Hague, and an umpire will shortly be chosen. Two attorneys representing the United States Government will open the case, and they will be supported by special counsel. The same privileges in presenting the defense are to be, of course, accorded to the Mexican Government. The outcome of the trial will be awaited with interest, not only on account of its own character, but also because it is the first proof of the working of that mechanism apparently so admirably adapted for the adjudication of international disputes.



A man was recently on trial in Michigan for the larceny of two sets of harness, a lap-robe and a buggy-whip. There seemed to be no doubt of his guilt. The court gave the jury the usual instructions in regard to their duty in ascertaining whether the value of the goods exceeded \$25.

The jury, instead of returning in a few minutes with a verdict, hung out six and one half hours and announced, when interrogated by the court officer at the court's order, that it could not agree. Finally the jury was brought in. "Don't you seem to be able to agree?" asked his honor.

The young farmer who had been selected as foreman arose.

"We're agreed," that the harness is worth thirty dollars and the robe ten, but we've split on whether the whip sells for fifty cents or a quarter."

A Malleable Glass.

A LAMP chimney that will not break on a lamp has at last been made. It results from a newly discovered process of making malleable glass, something the world has been searching for since the making of glass began, hundreds of years before Christ. The Egyptians, the Phoenicians, the Greeks, the Romans, and all nations since have striven in vain to make a glass that would mash before it would break. The problem has been solved by an Indiana man. His name is Louis Kauffeld and he lives in the town of Mathews, Ind. His may be regarded as the greatest achievement of the present age in the art of glass manufacture.

The secret of making the glass the Indianian refuses to divulge, but he gave ample tests with the finished product to prove its malleability. It seems impossible to break it from the effects of heat. Water was boiled in a lamp chimney made from the glass, and another of the chimneys was placed over a fire and permitted to attain such a heat that one side shrank in as if it were beginning to melt. In neither instance were there any sign of a crack. The glass appears to be clearer than the ordinary product and is more elastic in its molten state. Mr. Kauffeld claims that his glass contains neither lime nor lead, and at present is only manufacturing lamp chimneys such as are made in an off hand factory,—*Age of Steel*.



At the recent Webster celebration at Dartmouth College, Rev Dr. Edward Everett Hale told the following anecdotes:

Mr. Webster was very fond of children, and got along excellently well with them. I am always proud to tell this story of a child's game of speculation or commerce at which at some birthday party we were all playing in his own library. The great library table was cleared for us, and, as it happened, I sat by Mr. Webster's side. In the exigencies of the game, perhaps from my own imprudent playing, I had lost all my counters, and I cried out: "I have nothing left. Have I no friends who will lend to me?" With perfectly characteristic generosity, Mr. Webster pushed half his stock in front of me and said "Edward, as long as I live you shall never say you have not a friend. I was a child, but I treasured those words, and they always proved true."

Costly Trials.

Appropos of the question of attorney's fees, a member of the English law press, contributes an interesting piece of historical lore:

In May, 1871, commenced the longest trial that has ever taken place in England. It was the case of Tichborne V. Lushington, in which the plaintiff declared himself to be Sir Roger Charles Tichborne, supposed to have been lost at sea. He claimed the baronetcy and estates of the family, worth about 24,000 pounds a year. His claim was resisted by a minor son, and, after a few Chancery proceedings, trial began in the Court of Common pleas. For twenty-two days the claimant was examined, and in December the case of the plaintiff closed. The Attorney General, Sir J. D. Coleridge, afterwards spoke for twenty-six days, and on the one hundred and third day of the trial the claimant was declared non-suited.

Before the prosecution came on it said that the amount of money expended by the estate was 92,000 pounds. The claimant was then tried before Lord Chief Justice Cockburn for perjury and forgery, and nearly two hundred witnesses were called. The whole trial had lasted nearly four years, and we are told that almost 200,000 pounds was spent on the proceeding.

Before Goudie, the Liverpool bank clerk, was arrested it is calculated that something like 50 pounds a day was spent on searching for him. It will easily be seen how money may flow like water in cases of this sort, when hundreds of people have to be tipped here and there in order to obtain the necessary information which leads to arrest. Before Goudie was placed in the dock, nearly 8000 pounds was spent on him. To this must be added the 250 pounds which the bank offered for his capture.

When the trial commenced the most eminent lawyers in the country were retained. Absolutely no expense was spared by either side, and, what with counsels' fees, witnesses expenses, moneys spent on searching for information and tips to people who won't speak without "oiling," very little remained out of 20,000 pounds.

But 1,000 pounds is as a drop in the ocean compared with the cost of some of the greater trials.

One of the most extraordinary wills ever made, and which necessitated law proceedings which amounted to something like 500,000 pounds was that of Peter Isaac Thellusson, a Genevese merchant of London. This affluent trader left 100,000 pounds to his widow and the remainder of his property—namely, 600,000 pounds he left to trustees to accumulate during the lives of his three sons, and the lives of their sons; then the estates that were purchased with the produce of the accumulated funds were to be conveyed to the eldest lineal male descendant of his three sons. He also made the proviso that should no heir exist the whole amount was to be applied to the

reduction of the national debt. The will was contested by the heirs at-law, but finally established by the House of Lords.

On the death of the last surviving grandson a dispute arose as to whether the eldest male descendant or the the male descendant of the eldest son should inherit the property. The latter won but the legal expenses of the case were so heavy that almost all the original 600,000 pounds was swamped. After this trial the government passed a law prohibiting any one to leave property for the purpose of accumulation for a period of more than twenty-one years after death.

Some years ago two brothers named Bidwell came over to England from America with what they considered a perfect system for robbing the Bank of England. By the most ingenuous methods of forging bills they managed to extract no less than 202,000 pounds from the Old Lady of Threadneedle street. One day, however, a forged bill was detected through being undated and the brothers fled to America. The bank—as they always do in cases of fraud—followed them, caught them and had them sent back to England for trial. They were convicted and sentenced to a long term of imprisonment, but before the bank obtained the verdict the bank were mulcted of another 46,000 pounds which the governors had to debit “to cost of law proceeding.”



A Remedy Needed.

Former Justice of the Supreme Court Daly and ex-assistant District Attorney Francis L. Wellman, counsel for the Metropolitan Street Railway Company, during an interruption of a case in which they were engaged on opposite sides were discussing the odd names of litigants in different suits.

“Take the famous case of *Bridges v. Shallcross*, reported in the Sixth West Virginia Reports, for instance,” said Mr. Wellman.

“That case was most ordinary,” said ex-Justice Daly, “compared with the truly remarkable case reported in the Arkansas law reports a few years ago.

“In that case a man by the name of Driver was tried for stealing five hogs belonging to a Mr. Pig. One of the witnesses was named Hamm, the prosecuting attorney’s name was Chew, and the counsel for the defense were Miles & Miles.

“The oddness of the names occasioned much merriment in the court, which was brought to a climax when one of the counsel propounded the following question for the judge:

“If Driver drove Pig’s hogs for Miles & Miles would Hamm be fit to Chew?”

“The court reserved decision.”—N. Y. Times.

A Feature of the Fair.

A TENTATIVE program for the International Congress of Lawyers and Jurists at the World's Fair to be held in St. Louis, 1904, includes among its lecturers the most eminent expounders of the law in every nation of the first grade.

The congress will be held during the month of October. The first order of business will be the organization by the election of a presiding officer, a secretary and the making of a provision for the permanent preservation of the labors of the congress.

Speakers and the subjects assigned to them present this remarkable array: Sir Richard Webster, Lord Chief Justice of England, on "The Anglo-Saxon System of Law; Its Present Condition and Administration;" Melville W. Fuller, chief Justice of the United States, "The Anglo-Saxon System of Law, and Its Administration in the United States;" and in the following order these speakers and subjects:

The procureur d'Etat, on "The Civil Law; Its Progress and Its Present Condition as Modified by the Code Napoleon;" James Bryce, M. P., "The Adequateness of the Civil Law to Meet Modern Social Conditions as Compared with the Anglo-Saxon System of Jurisprudence;" by the chief law officer of the Russian Empire, "The System of Civil and Criminal Law in Use in the Empire of Russia; Its Origin, Development and Distinctive Characteristics;" by the chief law officer of Spain, "The Spanish Law; Its Origin, Development and Present Status;" by the chief law officer of Italy, "The Italian Law; Its Origin, Development and Present Status;" by the chief law officer of Austria, "The Austrian Law;" by the chief law officer of Germany, "The German Law;" by the chief law officer of Switzerland, "The Law of Switzerland;" by the Chief law officer of Sweden, "The Existing System of law in Norway, Sweden and Denmark;" by Wu-Ting-Fang, "The Chinese Law;" by Marquis Ito, "The Law of Japan;" by Attorney-General Sir Richard Hart, "The System and Administration of Law in India Under British Control;" by Honorable William H. Taft, civil governor of the Philippine Islands, "A General View of the Systems of Laws in Oriental Countries; Their Difference in Theory from

the Systems of Western Europe, with Suggestions as to their Possible Harmonization;" by the attorney-general of Canada, "Anglo-Saxon Jurisprudence as Modified in Canada;" by the attorney-general of Australia, "Anglo-Saxon Jurisprudence as Modified in Australia;" by Joseph H. Choate, ambassador to Great Britain, "International Law; Its Inherent Defects—Means Looking Toward Some Method of Enforcement;" by Sir F. Pollock, Bart., "System of Ancient Law;" by James C. Carter, of New York, "Universal System of Law Applicable to all Civilized Nations, the Possibility of Its Development, and First Steps to be Taken in that Direction."



It was a dull day in the justice court, when a colored belle, radiant in finery walked in and said blushinglly:

"Jedge, I want to git yo' to do me a favah." "What is it?"

"I want yo' to mahhry me."

"I'm sorry, but I am already married."

"Huh! Yo' doan' s'pose I'd mahhry any lawyeh man, does yo'?"

"What would you marry?"

"Jes' nothin' less dan what I'se a-gwine to mahhry—a po'tah on a Pullman cah!" Then she flounced out.

"A porter on a pullman car," laughed the court. He thought it was a joke. Then he counted up his fees for the day, and concluded that it might not be a joke after all.



In and after-dinner speech at a banquet in New York the other day a well-known lawyer related this story of the late Recorder Smyth, who was for so long a time a terror to the evil-doers of the metropolis:

A young man came before him upon a grave charge and was accompanied by a lawyer in whose judgement the recorder had little confidence. The moment the accused was called upon to plead he jumped up hastily and said: "Guilty, your honor." The recorder knew he had a fair defense, and calling him close to the bar, said to him in a friendly manner: "Now, tell me who told you to plead guilty." "Me lawyer, your honor." "Why did he tell you that?" "Because he said if me case ever came up before that old hatchet face with the big nose I'd be sent up for life sure, and the deest thing I could do was to fall on the mercy of the court." Judge Smyth enteren a plea of "not guilty," ordered the case to be heard and at its conclusion the young man was discharged.

Jeopardy in a Justice's Court.

Bench and bar have laughed frequently over the story about the Irish justice who declared that he wouldn't hear the other side of the case because it had "a tendency to confoose the court," but a prominent Fairmont lawyer, Mr. Wait Conaway, is regaling his friends with one that goes it better. Fairmont lawyers, and in particular Mr. Conaway, are fond of good stories, and the one just out is a fair sample of the brand. Mr. Conaway recently was called to assist in the trial before a justice, a son of the old sod, not far from Littleton, of some employes of a pipe line company or an oil company, operating in the community, who were charged with trespass. With an eye to securing as much safety as possible a jury was demanded. The trial resulted in a verdict of not guilty, whereupon the court revolutionized practice by declaring that the verdict was then and there set aside, and the state granted a new trial. In spite of the expostulations of the learned counsel that it was against the constitution which provides that a man shall not be placed in jeopardy twice for the same offense, the court set aside the jury's finding. The second trial resulted in acquittal. The justice again set it aside, saying with all the judicial dignity possible:

"Misther Conaway, Oi hev been a justice of the pace in this deestriect for nigh onto thirty years, and the constytooshun has given me more throuble than any other wan thing. I have always been doubtful about it, an' so far as it applies to this case, the court is of the opinion that it is incorrect. Therefore I'll set this verdict aside and grant the sthate another new trial."



A Detroit millionaire who recently sat on a jury in justice court had only one criticism to offer, and in that he deplored the lack of dignity displayed by attorneys and officers of the law while in the court. The same criticism has been made before elsewhere, and the difficulty may be explained by an experience a stranger had in a Missouri temple of justice. He was struck by the same lack of dignity and an odor of bad tobacco when he entered the courtroom.

"Who is the man with his hat on?" he asked of a native.

"The sheriff," replied the Missourian.

"And the man with his feet on the table and his hands in his pocket

"The prosecuting attorney."

"Now, who's the old guy with the straw hat on and necktie, and the corncob frnnace and the fumigating tobacco?"

"The judge."

WEST VIRGINIA COURT OF APPEALS,

Decisions Handed Down at the Last
Term.

REPORTED SPECIALLY FOR THE READERS OF THE BAR.

Appearing Here For the First Time in
Print.

Knight v. Knight.
From Greenbrier County.
Decree affirmed.
Brannon Judge.
Syllabus.

1. To enforce an oral contract for the sale of land the evidence of the contract and its terms must not be doubtful, but full, clear and convincing.

Manss-Brunning Shoe Co. v. Prince.
From Mercer County.
Judgment reversed, verdict set
aside and new trial granted.
Brannon, Judge.
Syllabus.

1. A purchaser of goods cannot defeat payment for them on the ground either that he countermanded the order for them, or that the delivery is after the stipulated date, if he takes the goods from the railroad depot to his store, opens the boxes containing them and examines them, or does any act which only an owner can do.

2. A purchaser of goods who has right to rescind the sale contract, must rescind *in toto*, not in part. He cannot keep part of the goods and return the remainder without becoming liable for the whole.

3. A purchaser of goods cannot keep part of them, and return the remainder, and defeat payment for them according to the contract on the ground that the part returned were not of the agreed quality or make.

4. A verdict which, on the fixed facts of the case, is contrary to law must be set aside.

Feamster v. Feamster.
From Greenbrier County.
Decree reversed, remanded.
Brannon, Judge.
Syllabus.

A case in which only a question of fact dependent on evidence is involved, no syllabus of law is necessary or made.

Empire Coal & Coke Co. v. Hull Coal & Coke Co.
From Mercer County.
Affirmed.
McWhorter, Judge.
Syllabus.

1. It is not necessary to give jurisdiction, that the declaration contains an averment of the facts authorizing the plaintiff to sue in the county where the action may be brought; jurisdiction will be presumed unless questioned by plea in abatement interposed in proper time.

2. Where circuit courts, being courts of general jurisdiction take cognizance of causes, every intendment is in favor of their jurisdiction and rightfully to exercise it.

3. Point 2, Syl. Hinton v. Ballard, 3, W. Va., 582, and point 1, Syl., Humphreys v. Railroad Co., 33, W. Va., 135, reaffirmed.

4. Although the appellate court of this State will supervise the action of an inferior court on a motion for a continuance, it will not reverse a judgment or decree on that ground unless such action was plainly erroneous.

5. Point 1, Syl., Railroad Co. v. Lafferty, 2, W. Va. 104, approved.

Brannon, Judge.
Ex Parte Hill.

Bail after conviction.

After conviction of a felony there can be no allowance of bail by this court or a circuit court, except that for some cause extraordinary, not growing out of, but independent of, the criminal act, as for sickness, bail may be granted before conviction, or after it pending a writ of error and before actual commitment to the penitentiary. The party must be laboring under a present painful, severe and dangerous disease, either caused or aggravated by his imprisonment, and there must be strong probable reason, not mere fear, but based on facts, to apprehend that continued imprisonment will be fatal, or at least cause permanent grave injury to health.

2. Bail by supreme court.

The Supreme Court of Appeals has jurisdiction to award a writ of Habeas Corpus having for its sole purpose the obtaining of bail in a felony case, and to grant bail upon it. Bail may be granted on mere motion in the circuit court under the Statute.

State vs Henry.
Poffenbarger, J.
From Wetzel County.
Affirmed.
Syllabus.

1. In the trial of an indictment for murder all instruments which the evidence tends to show were used in the perpetration of the crime, may be produced for the inspection of the jury.

2. When the evidence shows that the coat worn by the accused, when with the deceased just before the killing, was found hidden in the prisoner's room between the mattress and slats of his bed, and there are spots on it which might have been made by the blood of the deceased, and on other clothing of his worn at the same time similar spots are found, and the mode of the killing was such as makes it probable that the blood of the victim did spatter upon the clothing of the murderer, such clothing may be produced at the trial for the inspection of the jury, and a witness who saw the spots soon after the murder may testify that he supposed the spots were blood stains, as the statement is nothing more than his opinion, and that is all he could state with certainty.

3. It is not error to allow the jury to inspect instruments used in the commission of the crime and the clothes of the prisoner, bearing marks which the evidence shows may be blood stains, and to hear non-expert testimony as to the character of the marks, without it having been established by microscopic examination or otherwise that the marks are blood stains.

4. When the motive for the crime appears to have been robbery and there is evidence tending to show that the prisoner was practically without money just before the murder and had considerable money immediately afterwards, but claims that it was his own, it is proper to ask him on cross examination if he did not, shortly before the murder, deposit for drinks at a saloon, pay-checks representing wages due him.

5. It is not error to refuse to instruct the jury that they are not permitted to say blood found on the clothes of the accused, is human blood, in the absence of the establishment of that fact by a microscopic examination.

6. When a view of the premises is taken the court is not bound to instruct the jury that they should not consider as evidence any of the objects or locations pointed out to them upon the grounds.

7. Errors in the rulings of the court, made during the trial and as to other matters not vital and jurisdictional in their nature, but such as may be waived, must be affirmatively shown by the record, else the proceedings are conclusively presumed to be regular.

8. The following verdict is sufficient: "We, the jury, find the defendant, S. H. guilty of murder in the first degree as charged in the within indictment."

9. When, upon a writ of error a judgment in a criminal case, overruling a motion to set aside a verdict and award a new trial on the ground that the verdict is contrary to the evidence, not the facts, is certified in the bill of exceptions, this court will not reverse the judgment, unless, after rejecting all the conflicting oral evidence of the exceptor, and giving full faith and credit to that of the adverse party, the decision of the trial court still appears to be wrong.

Jackson v. Land Association.

From Randolph County.

Decree affirmed.

Brannon, Judge.

Syllabus.

1. A commissioner of delinquent and forfeited lands divides a large tract into lots for sale. At one end of the tract he marks a line from the outside line part of the way through the tract; at the other end he marks a line part of the way through the tract. These two lines extended through the tract will not meet and form a continuous line from outside to outside, but are distant from each other. The plat of the commissioner shows a straight continuous line from outside to outside of the tract. This straight line, conforming to the plat is the true line.

2. A line should not be deflected except in order to conform to the intention of the parties. And, if possible, a line should be construed to mean a continuous line.

3. The law is different in forcing a purchaser to pay purchase money in case of an executory contract from what it is in the case where a deed conveying legal title has been accepted by the purchaser, with general warranty.

4. An answer seeking to resist the enforcement of a lien for purchase money in a deed of general warranty for land must allege insolvency of the grantor, or a better adverse title, or a suit actually pending or threatened contesting the title and in case of a suit only threatened, the answer must state plausible and substantial grounds for such threatened suit, such grounds as ought to cause a reasonable man to fear the loss of his land.

Bank V. Loar.

McWhorter, Judge.

From Wayne County.

Reversed.

Syllabus.

Upon a demurrer to evidence, in applying the rule laid down by this court in *Heard v. Ry. Co.*, 26, W. Va., 455, Syl. Pt. 1, the demurree is not entitled to the benefit of evidence offered in the case by him, nor to any inferences to be drawn therefrom, which evidence is incompetent and inadmissible but which has been improperly admitted over the objection of demurrant.

State of West Virginia, Ex Rel,
Wm. Kloak, Aug. Kloak and Louis Schneider,
Partners, trading as Kloak Bros. & Co.,

vs.

J. L. Corvin and Mary P. Atkinson.

Poffenbarger, Judge.

From Mercer County.

Reversed and Remanded.

Syllabus.

1 Reasonable counsel fees may be included in estimating the damages in an action on an injunction bond, when the injunction has been improperly or wrongfully sued out, and the counsel fees were paid, or agreed to be paid, for procuring the dissolution of the injunction.

2. A bill to enjoin a sale of personal property under a deed of trust, securing the payment of non-negotiable promissory notes, given for the purchase money of the property, alleging also that the plaintiff therein had refused to accept the property under the contract and had caused the same to be sold under attachment proceedings and purchased it, is essentially and primarily a bill for injunction having been dissolved, counsel fees are allowable as part of the damages in an action on the bond.

3. In such case money actually and necessarily paid out for traveling expenses and other legitimate purposes, in procuring the dissolution of the injunction, should be included in the damages, but nothing should be allowed as compensation for loss of time nor for the detention of the property.

State vs Clark.

Poffenbarger.

From Mingo County.

Affirmed.

Syllabus.

1. A bare trespass against the property of another, not his dwelling-house, is not sufficient provocation to warrant the owner in using a deadly weapon in its defense. Under certain circumstances trespass against the dwelling-house will justify it.

2. Where an attack is made with murderous intent and with a deadly weapon, there being a sufficient overt act, the person attacked being himself without fault, is under no duty to fly or retreat; he may stand his ground and if need be kill his adversary.

3. One who has been threatened with such an attack and has reasonable ground to believe it will be made, may arm himself for defense, and in such case no inference of malice can be drawn from the fact of preparation. But it is for the jury to determine, from all the evidence in the case, whether there was reasonable ground for such belief, and the purpose for which the deadly weapon was procured.

4. In case of assault, not made with the intent to kill or do great bodily harm, or when the person assaulted is not in his dwelling-house

he cannot justifiably kill his assailant without first having retreated "To the wall."

5. The court is not bound to give two or more instructions on the same subject or phase of the case and substantially alike.

6. It is not error to refuse instruction, the giving of which would raise immaterial and irrelevant issues and thereby tend to mislead and confuse the jury.

7. The statutory requirements respecting the time of issuing writs of *Venire facias* for petit juries and summonses to jury commissioners to draw the jurors are directory, and substantial compliance therewith is sufficient.

8. Separation or misconduct of the jury in a criminal case only raises a presumption of impurity in the verdict, and if that presumption be fully overcome and it be shown beyond reasonable doubt that the prisoner has not been prejudiced thereby, such separation or misconduct does not vitiate the verdict.

State vs Beatty.

Puffenbarger J.

From Preston County.

Affirmed.

Syllabus.

1. If in a felony case, the record shows that the defendant "plead not guilty" instead of saying "the said defendant says he is not guilty" &c., the record is sufficient, as to the plea, to sustain a conviction. The plea operates as a legal denial of the charge laid in the indictment, going to all of its allegations, and to put the defendant upon trial, and it is sufficient if the record show that the prisoner has plead not guilty.

2. The omission from the record of the *similitur* or joinder of issue, in such case; does not vitiate the judgment; for the plea of not guilty, without more, legally puts the defendant on trial by jury, and the *similitur* is a mere form, although the better practice is to insert it.

3. The court is not bound to instruct the jury, in a murder case, that if they find the defendant guilty of first degree murder, they may recommend in the verdict that he be confined in the penitentiary, and thus avert the infliction of the death penalty, unless the prisoner requests the giving of such instruction.

4. When, in such case, the record is silent as to the asking, giving, or refusal of such instruction, it is conclusively presumed that, if requested by the prisoner, it was given, and if it was not requested, that he waived it.

5. The rule that the appellate court will not reverse the judgment of an inferior court, unless error appear upon the face of the record, and that all presumptions are in favor of the correctness of the judgment, and that errors in the rulings of the court made during the progress of the trial, and as to other matters not vital and jurisdictional in their nature, but such as may be affirmatively shown by the record, applies to procedure in criminal as well as civil cases.

6. Whether murder is of the first degree or second degree depends upon whether the act which produced death was accompanied by specific intent on the part of the slayer to take life. When such intent exists, and the circumstances of the killing are not such as to excuse or justify it, or reduce the offense to manslaughter, the homicide is murder of the first degree. Subject to the foregoing exceptions, the law is, that, when the act of the accused which results in death is accompanied by such intent, the act and intent combined include all the elements of first degree murder. In all cases of killing under circumstances which render the slayer guilty of murder, and the act which produced death was not accompanied by such specific intent, the grade of the crime is murder of the second degree.

7. Where the killing, although intentional, is done in passion, in heat of blood, upon sudden provocation by gross indignity, out of tenderness for the frailty of human nature, the law reduces the offense to manslaughter, but, however great the provocation may have been, if there has been sufficient time for passion to subside and for reason to return, the homicide is murder.

St. Lawrence Co., vs. Holt and Mathews.

Poffenbarger, Judge.

From Pocahontas County.

Affirmed.

Syllabus.

1. An adjudication that a particular case is of equitable jurisdiction is not void, even if erroneous and cannot be disturbed by a collateral attack.

2. R. conveyed to K. certain real estate in consideration of twelve thousand dollars, of which three thousand dollars was paid in cash and the residue secured by a deed of trust. K. then conveyed the land to the St. L. B. & M. Co, and, later, R. caused the trustees to advertise the land for sale, under the deed of trust. Thereupon K. and the St. L. B. & M. Co. enjoined the sale, alleging in their bill that H. & M. claimed to own 1,632 acres of the land in fee under an older grant than the one under which plaintiffs claimed and had included the same in a survey made by them, that this claim constituted a serious cloud on the title and that plaintiffs did not know whether said surveys were accurate or said title of H. & M. valid, and praying that the sale be stayed until the title should be settled and quieted and that H. and M. and R. be required to deduce their respective titles. Although made parties and served with process, H. & M. made no appearance or defense to the bill. The circuit court caused the St. L. B. & M. Co. to bring an action of ejectment and enjoined the sale pending the trial of the ejectment suit. R. appealed from this action and the appellate court dissolved the injunction and unqualifiedly dismissed the bill and decreed costs against the complainants.

HELD: That the decree is an absolute and final adjudication that H. & M. had no valid title to the land and estops them to set up, in

the action of ejectment, the said older grant under which they claim, and that the court properly allowed the St. L. B. & M. Co. to introduce, on the trial of said action, the record, and decision of the appellate court, in said chancery cause, as evidence, and instructed the jury that the legal title to the land was in said trustee.

J. F. York, Administrator, &c.,
vs.

Railway Officials & Employees Accident Association.
Poffenbarger, Judge.
From Wayne County.
Reversed and Remanded.
Syllabus.

1. A paymaster's order, given by an employee of a railway company to an insurance company, for the payment, out of the wages of the employee thereafter to be earned, of an insurance policy premium in installments, reciting that the assignment is "in lieu of payments," and containing a clause whereby the insured agrees that failure from any cause to deduct from his wages any of the installments shall be at his risk and effect a forfeiture of all rights of himself and his beneficiary under the policy, and waives for himself and beneficiary, notice of the payment or non-payment of the premium, is not equivalent to the payment of the premium, although delivered by the insurance company to the paymaster of the railway company and filed in his office; and if, after it is so filed, the employee continue in the service of the railway company and earn wages continuously until the time of his death by accident, but, by inadvertance, the premium is not deducted, and he draws all his wages and the premium is not actually paid, no recovery can be had on the insurance policy, when the policy and application therefor make the order a part of the policy and contract.

Fearon Lumber & Veneer Co.,
vs.

W. P. Wilson, et al.
Poffenbarger, Judge.
From Wayne County.
Reversed and remanded.
Syllabus.

When a deed is made in pursuance of a contract of sale of real estate, entered into under a misapprehension, or in ignorance, of the location of the vendor's land and conveys to the purchaser a tract of land wholly different in location and character from the land contracted for, a court of equity will, at the suit of the vendee, rescind the contract of sale and put the parties *in statu quo*, although there was no fraudulent intent on the part of the grantor. In such case rescission results from the mutual mistake under which the parties entered into the contract.

Hurricane Telephone Co., vs J. Chas. Mohler, et al.

Poffenbarger, J.

From Kanawha County.

Affirmed and remanded.

Syllabus

1. A bill of discovery may be filed by a party to an action at law to compel discovery in aid of the action or of the defence thereto, although by sections 22 and 23 of chapter 130 of the Code the party filing such bill may compel the other party to attend and be examined as a witness for him in relation to the same matters.

2. An appeal lies from an order requiring an answer to such bill when the amount involved in the action is of greater value or amount than one hundred dollars exclusive of cost, although it is not an order for the payment of money nor one directly involving freedom.

3. Although, as a general rule, a bill of discovery does not lie for the purpose of determining whom the plaintiff therein may sue at law, if the bill alleges that the defendants have been sued at law as late partners and sets out enough to show that a good cause of action has been alleged against the defendants as such co-partners, and the defendants have filed a plea in abatement, denying that the firm or company whose name is signed to the agreement sued on was, at the time said contract was made or at any time, a partnership composed of the said defendants, they may be required to discover whether they were such partners to aid the plaintiff in maintaining his side of the issue thereby tendered.

J. R. Cochran, vs. Shanahan, Stull & Ayres.

Poffenbarger, Judge.

From Mercer County.

Affirmed.

Syllabus.

1. The law of fellow servants, as enunciated in Jackson vs. Railway company, 43 W. Va., 380, approved and applied.

2. An employee of a firm, engaged in the opening of a tunnel for a railroad, was directed by the foremen of the employers to swab out drill holes with a wooden stick. After swabbing out fifty or more holes and finding one which was obstructed, he was required by the foremen to take a steel drill and open the obstructed hole. While doing so, under the direction of one of the foremen who stood by and gave instructions, an explosion occurred in the hole which wholly destroyed one of the employee's eyes and seriously impaired the other. There was no evidence that the firm had failed to perform any of the duties imposed by law upon masters for the protection of their servants, such as providing a safe place to work, suitable tools, machinery and appliances to work with, competent servants and proper rules for conducting the business, nor was the cause of the explosion shown. The court sustained the motion to exclude the evidence after giving the plaintiff an opportunity to take a non-suit. **Held:**—That the evidence was insufficient to sustain a verdict and was properly excluded by the court.

McKendree v. Shelton.

From Cabell County.

Judgment affirmed.

Brannon, Judge.

Syllabus.

1. When a paper which is to constitute a part of a bill of exceptions is not incorporated into the body of the bill, it must be annexed to it, or so marked by letter, number or other means of identification mentioned in the bill, as to leave no doubt, when found in the record, that it is the one referred to in the bill of exceptions otherwise it will be disregarded. (4 Wallace 187).

2. That a copy of a paper is attached to a pleading in the case, which purports to be the same as the paper mentioned in the bill of exceptions, does not make it a part of that bill, nor can this court presume that it is the same paper read in evidence and excepted to. (4 Wallace 187).

White vs Cook.

Poffenbarger, J.

From Mercer County.

Affirmed.

Syllabus.

1. A contract between a sheriff and his deputy, providing that the deputy shall collect all the taxes, with slight exceptions, and do all the work of the sheriff's office in one district and attend the sessions of the court during stated portions of the time each year, and is to have all the fees and commissions allowed by law upon the work done by him, and is to pay the sheriff one hundred dollars a year, the agreement violates Sec. 6 ch 7 of the Code, prohibiting the sale or farming, in whole or in part, of any office under the laws of this state.

2. When such contract provides that the payment of the sum agreed to be paid by the deputy shall be paid out of the fees and commissions, it is not in violation of said statute, but when the contract provides for the payment of such sums without specifying that it shall be paid out of the fees and commissions, it is a contract to pay at all events and amounts in law to a purchase of the office in part and is, therefore, illegal.

3. A bond given by a deputy, conditioned for the performance of his duties as deputy sheriff, and containing in one of its clauses a reference to said contract, is void as to the private interest of the sheriff and his deputy, so far as it may relate to them, and no recovery can be had thereon for any fees or commissions or the sum specified in said contract to be paid by the deputy.

4. But the sheriff may recover thereon the taxes, fines, other public dues and money received by the deputy on executions and other process, although he may have satisfied the state, county, district and creditors as to such fund and such recovery only operates to reimburse him; for these funds came into the hands of the deputy as a defacto officer, by virtue of the law as much as by reason of the contract, and

primarily belong to the public and innocent private individuals, and said statute is not allowed to so operate as to imperil the interests of the public or innocent persons.

5. Public policy demands protection of public funds in the hands of *de facto* officers as well as prohibits the sale or farming of offices, and although ordinarily where a contract grows immediately out of, or is connected with, a contemporaneous or prior illegal contract, the illegality of such contract enters into the contemporaneous or subsequent contract and vitiates it, from considerations of public policy, that rule is not applicable when the illegal part of the contract can be severed from the balance of it and it is necessary to do so to protect funds, which, in their nature primarily belong to the public and persons unconnected with the illegal contract.

6. A sheriff cannot maintain a bill in equity for an account against his deputy without showing, by sufficient allegations, special circumstances entitling him to recover as necessary to complete and adequate relief, or that the accounts are complicated and intricate.

Eva B. Swindell, Plaintiff Below, Defendant in Error,
vs.

H. H. Harper, Defendant Below, Plaintiff in Error.

Poffenbarger, Judge.

From Raleigh County.

Reversed and Remanded.

Syllabus.

1. A defendant upon whom process summoning him to answer appears to have been served, cannot take advantage of any variance in the writ from the declaration, unless the same be pleaded in abatement.

2. When the amount of damages assessed by the jury is within the amounts laid in both the writ and the declaration, a motion in arrest of judgment is properly overruled.

3. In an action for slander, words spoken at different times before suit brought, though not declared on, may be given in evidence to show the intent with which the words declared on were spoken, but words spoken after suit brought cannot be given in evidence, for they may be ground for another action.

John W. Smith,

vs

A Gott, Adm'r., Etc., et al Mahala A. Johnston, Appellant,

Poffenbarger, J.

From Mercer County.

Reversed.

Syllabus

1. Two sisters, being joint owners of a tract of two hundred acres of land, married and afterwards partitioned the land by mutual conveyances, their husbands joining in the deed, but, by inadvertence, the conveyance of the share of one of the sisters was made to her and her husband. The husband having died, his judgment creditors,

claiming that he was the owner of an undivided half of one of the hundred acres of the land so conveyed, sought to enforce the alleged liens of their judgments thereon and to subject the one-half of said land to the satisfaction thereof. Held:—That the equitable title to the whole of said one hundred acres is owned by the widow of said decedent and that the creditors have no liens upon any part of the same.

2. In the absence of statutory enactments establishing a different rule, a judgment creditor acquires no better right to the estate of the debtor than the debtor himself has when the judgment is recovered. He takes it subject to every liability under which the debtor held it and subject to all the equities which exist in favor of third parties; and the lien of his judgment is limited to the actual interest of the debtor in the land.

The Chilhowie Lumber Coompany

vs.

J. C. and W. B. Lance & Co.

Poffenbarger, Judge.

From Mingo County.

Affirmed.

Syllabus.

1. In an action at law against a non-resident, in which an attachment has been sued out, if the absent defendant appears generally to the section, there may be a personal judgment only against him, or a personal judgment and an order and judgment subjecting the attached property, although there is no order of publication in the case.

2. Although a writ of error lies generally only for errors of law apparent in the record, if a court proceeded in a cause, upon the erroneous assumption or finding of some preliminary fact, essential to its exercise of jurisdiction in the premises, as when there is want of such proceedings as is necessary to bring the party into court and make him a party to the record, its finding in respect to such matter of fact is reviewable on such writ.

3. The action of the court below in overruling a motion to set aside a judgment before the expiration of the term at which the judgment was rendered, on the ground that there was an unauthorized appearance by attorney as to the judgment debtor, when several orders entered in the case at former terms show a general appearance for him by attorney, will not be disturbed by the appellate court unless the motion was supported by a clear preponderance of evidence.

Fred Judy v. O. G. Lashley.

Poffenbarger J.

From Tucker County.

Writ of Prohibition Awarded.

Syllabus.

1. Police power of a municipal corporation depends upon the will of the legislature, and a city, town or village can only exercise such

police power as is fairly included in the grant of powers by its charter.

2. Section 28 of chapter 47 of the Code, by vesting in the councils of municipal corporations power and duty "to protect the persons and property of the citizens of such city, town or village, and to preserve peace and good order therein," does not confer power to punish acts made criminal by the State law and fully covered thereby, except such as would be attended with circumstances of aggravation not included in the State law. Such power must be specifically and expressly given by the legislature before it can be exercised by such corporation.

3. The carrying of deadly weapons being an offence fully provided for and punished by law and being an act not in itself amounting to a breach of peace, cannot be made an offence and punished by a municipal ordinance, unless expressly authorized by the municipal charter.

4. Prohibition lies to restrain the mayor of a town, incorporated under the provisions of chapter 47 of the code, from imposing a fine upon a person for carrying deadly weapons and from collecting the same, under an ordinance making such act an offence and punishing it by fine and imprisonment, as such ordinance is void and the mayor is without jurisdiction in the premises.



Over in Nicholas county the other day a young gentleman was driving along the road with what in Pendleton county is known as his 'best girl' seated contentedly beside him in the buggy. The horse had been allowed to select his own slow gait on the cool highway. The young man's arm had stolen gently around the young lady's waist, and there you had a picture of sweet content but seldom witnessed. Presently the couple became aware that a farmer passing along the road in the opposite direction was staring at them. The young gentleman in the buggy instantly flashed defiance at the intruder. "Rubber!" he cried sarcastically "Rub her yourself," quickly answered the farmer; "you've got your arm around her."

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UOTE for the Constitutional Amendments. They are the result of the best judgment of your representatives as to the needs of our State.



CH. BRONSON, Circuit Clerk of Mingo county, has been renominated by his party for the clerkship, and the opposition concede that he ought to have the office. That is an endorsement to be proud of.



IT is refreshing to see the New York press and bar refusing to support a party nomination for a Judge on the ground that it is not the best, and was influenced by political motives solely. When voters thus boldly throw off their allegiance to party in judicial elections we are not irretrievably hopeless.



THE Co-operative Publishing Company are making the practice of law easy by their series of "Trial Briefs." They have just issued the third of this series which is the "Criminal Trial Briefs." This series is edited by Austin Abbott, which is a guaranty of exhaustive, careful, and accurate work. We do not know of any other recent publications that are more valuable to the practical lawyer.



SO it appears that the man who was adjudged by the mob in Randolph county to be guilty of murder, and who would have been "strung up" if caught has stood his trial in a Court of law and been adjudged liable to a short imprisonment in jail. There's a difference between the judgment (or lack of it) by the mob and by an orderly tribunal which reaches conclusions by a deliberate and searching investigation.

AUNT Larissa Shailer, the oldest woman in Connecticut, has celebrated her one hundred and second year. She gives the rules for longevity as follows: "Don't fret and worry, and don't have anything to do with doctors. I never did, and you can see the result. And then, too, you might say, 'Don't get married.'" With a little laugh the old lady added. "Not but what I might have been. I don't say I haven't had offers."



THE real test of a man comes, not when he is compelled by circumstances to earn his daily bread by the sweat of his brow, but when the bread has been earned and the man is free to do what he chooses; then comes a sudden and often disastrous revelation of the poverty of his spirit, the narrowness of his resources. The greatest perils come, not when men are in adversity, but when they are well fed, well clothed, and well housed. That such perils await the whole world no man can doubt; that they are to be specially pressing in this country no one can question.



JUDGE R. M. BENJAMIN, of Indiana, maintains that the Legislature of Pennsylvania has the power to classify the coal mines of the State with reference to the depth and thickness of the veins and fix schedules of reasonable minimum rates per ton for mining coal, and a suitable penalty against any operator who makes contracts with miners for less than such prices. This position is capable of being supported by very strong argument, and Judge Benjamin backs it up with strong authority from the Courts; but at the same time it is the position before which the country hesitates. It would be radical—not to say dangerous—legislation in its tendency. If this can be done by law, why may not the law prescribe the minimum wages a farmer may pay for harvesting his wheat?

The Reduction of Case Law.

THE address of the President of the American Bar Association has given rise to some discussion by his suggestion of adopting the custom of the civil-law countries in codifying all law as a means of diminishing the overwhelming avalanche of case law that afflicts this country.

He points out that in all civil-law countries the law has been reduced to a statutory form; the decisions of the courts do not form precedents; they neither add anything to the law nor do they take anything from it. In France, for instance, he says there are two annual publications relating to the proceedings in the courts; one giving sketches of criminal and sensational trials, the other consisting of gossip about proceedings in the courts. They both come under the head of light reading, and very light reading at that, and neither ever contains the slightest reference to the principle of law. In the preface to the volume of 1901 of one of the series, called "A year of Justice," the author begins by saying: "The judiciary passes onward and leaves no trace. It has dictionaries, but no annals. No one keeps the journal of the court-room."

The system has other advantages. Arguments are oral; printed or written briefs being rarely used; and cases are speedily disposed of. As the judges write no opinions, they have time to read and improve their legal knowledge. Not many books are used in court, but questions of fact are closely argued.

Custom reconciles us to almost anything, and it would reconcile us to this also. To the European continental lawyer nothing seems more amazing than our rule of *stare decisis* and endless chain of cases. "Why," they ask, "should a judge who has decided one case wrongly be obliged to decide the next one wrongly also, thus making the error of yesterday the law of to-

day? Why should he not utilize knowledge continually increased by reading, study, and observation?"

Nevertheless, much could be said on our side if it was worth while. But as to the discretion used in deciding cases the courts under either system seem to have about the same; for our courts have no need of precedents. The greatest and most serious difficulty of our system grows out of the vast accumulation of law books; a difficulty that increases every day.

Most of the cases now decided are of no use to the law as a science, mere threshing over old straw, saying again what has been as well or better said a hundred times before. According to the inevitable law of evolution the decisions become more and more discordant; and much of the time of the courts is taken up in vain efforts at reconciliation. At the present rate the time must soon come when, if two lawyers meet like the ancient augurs without laughing, they will exhibit remarkable self-control. Occasionally some one writes an article for a law journal imploring the judges to write short opinions; and every judge that reads it at once sends out and buys a gross of new, bright steel pens warranted not to corrode. In such matters the judges must be left to their own devices. Clearness and brevity are valuable qualities in the law; but they are not indispensable, as might be shown by a long line of authorities; and when the mere compressed head-notes of cases fill two immense volumes annually, it will be seen that even brevity in writing opinions would afford but small relief.

While recognizing the difficulty of codification, the address cites many practical examples of its success, the most recent that of the Negotiable Instruments law, which in a short period has been adopted by Congress for the District of Columbia and twenty different states, so that it promises soon to be the universal law, and a vast number of discordant decisions will have passed into oblivion.

The address concludes as follows:

"Whatever difficulties may be in the way of codification—and

there are many—I think that most lawyers recognize that it is the goal towards which we are inevitably tending. There seems to be no other refuge from the riotous and confusing pandemonium of cases. Writing more than fifty years ago, Mr. Spence said: “What may be effected when some modern Tribonian shall appear, with the capacity and the power of compiling from the now almost countless volumes of the law a rational and uniform system of jurisprudence, unfettered by merely casual and technical principles, it would be idle at present even to hazard a conjecture.”

Perhaps it might be better to adopt the ideas of the opportunist in reducing to a code form these branches of the law that are most amenable to that treatment, and thus to proceed by regular gradation to those that are more difficult. If we wait for the future Tribonian, whose imperial grasp will enable him to cover the whole ground in one successful and comprehensive effort, it is probable that no one of us will live to be able to say “*nunc dimittis*.”



Judge Horton, of Chicago, is reported as saying in a recent case:

“**S**WEARING falsely is as common among a certain class of people as their opportunity to swear before a court. The mothers of these children have not told the truth. Perjury is becoming altogether too common. I have seldom had the opportunity to try a case in which there has been no perjury.”

This is the common comment that comes from our Courts. But what are we going to do about it? the child is not instructed at home. The State will not allow him to be instructed in the public schools. An oath is to call God to witness that what we say is true; but if God is eliminated from the home of the child and from the educational system of the State, where is he to learn the sanctity of an oath?

The Shell.

THE original Democracy had its birth among the Attic populace, who ruled the city of Athens according to their sweet will. If one of their would-be leaders expressed sentiments or opinions contrary to the tastes of the populace, a storm of condemnatory shells was hurled against him and he was ostracized. This ostracism resulted in his banishment from his birth-place, his home and his country. Of course, the throwers of the shells could not be punished under the law. They were exercising their legal functions, and doing what they had a perfect right to do. The only fear they need have had was the fear that a little later, and for other reasons, or for no reasons, some of them might be subjected to the like punishment of the merciless shells.

In the State of North Carolina, some of our fellow citizens presumably some of our colored brethren, recently brought back into practice this use of shells. They were members of a church. One of the members of the same church ventured to vote at an election the modern ticket which bears the ancient Athenian name, and is called the Democratic ticket. Either because the name of the ticket recalled to their minds this Grecian practice of ostracism, or for some other reason, the persons in question proceeded to use the shells. They assailed this unhappy voter and shelled him out of the church. Why should they not do so, if they wished? Is it possible that the citizens of our great and free America should be forbidden to use the shells, when the people of old worn-out Athens could do so when they pleased? Or, could it be thought to make any difference that the ostracism in this instance was indirectly pointed against the Democracy, who in Athens were themselves the throwers of the shells? Could not the Athenians ostracize the Democracy, or whomsoever else they chose?

The Supreme Court of North Carolina, in the case of State

V. Rogers, (88 S. E. Sep. 34) had this question formally presented to it. The persons who thrust this voter out of their church were indicted as for a crime under the statute against intimidating voters. The court, without expressly referring to it, was doubtless influenced by the ancient and venerable practice of ostracism so long in vogue among the Greeks. Whether for that reason or for some other, the court held that the statute only applied when the voter was threatened with pecuniary loss, personal injury or physical restraint, and therefore reached the conclusion that it did not apply to the case before it.

If, therefore, our friends do not vote as we like them to, we are free to expel them from our church, and presumably to give them the shell in many other similar fashions.



THE American Law Review raises the point as to whether the detective Craig, who was killed in the recent accident to the President's carriage, is not debarred of any right of action by "imputed negligence," he being on the driver's box in full view of the circumstances. "The principle is" says the editor, "that the abrogation of the doctrine of imputed negligence does not operate to exonerate the passenger from the exercise of reasonable care *for his own safety*. If, therefore, he is riding by the side of the driver, in an open carriage, and the driver, on approaching a railroad track, fails to make adequate use of his faculties to ascertain whether or not a train or car is approaching,—then the passenger may be imputable with contributory negligence on his own part, in failing to discover the danger and to call the attention of the driver to it, or to remonstrate with him for his course of conduct; or, if necessary for the passenger's own safety, to leave the vehicle. This rule would not apply so as to bar an action by the Secretary of the President, who was seated away from the driver, and (it may be assumed) without an opportunity to discover and to inform the driver of the danger."

The Advancement of the Legal Profession in West Virginia.

THE elevation of the Legal Profession, in this State, within the past ten years, has been sufficiently marked to be conceded by every observer. The general equipment, the ethical standard and the professional ideals have all been advanced.

Perhaps the most potent influence in bringing this about has been the elevation of the requirements for admission to the bar. The new conditions of admission secured through the persistent efforts of the State Bar Association have borne fruit in every county, in keeping out the incompetent, weeding out the shysters and interlopers from other States, and making the privilege of practicing law to depend upon distinct and specific requirements that cannot be evaded.

We know this in a general way, and every lawyer who has a genuine appreciation of his Profession takes pride in the fact; but it would be an additional pleasure if we could have the specific data upon which these assumptions are based. We would like to have the testimony of every individual bar as to the status of the Profession in that particular county. It would make interesting and profitable reading if we could have a frank and fair criticism of the condition of the Profession at each county bar from the standpoint of that particular bar.

This Journal would like to have a short review for publication in successive numbers, of the general condition of the Profession in each of the counties of the State. Without calling upon any individual, we will throw open the door to any volunteer in each and all of the counties to send us a review of this character. In order to more clearly indicate the lines of information we seek, we will ask that these reviews answer the following questions:

1. The number of attorneys in active practice.
2. The proportion of attorneys to the population of the county.

3. The names of those who are regarded as leaders of the local bar, and a comparative estimate of their equipment with that of their predecessors.

4. The ethical standard of the local bar—in what particulars is it advancing or declining.

5. Are the regulations for admission to the bar effective in your county?

We are sure that all the bars of the State will be interested to read these reviews of every other bar, as well as its own.

We will publish any reviews we receive without disclosing the authorship, if so requested, and they will be regarded as strictly confidential.

Let any member of any bar feel that he is personally invited, and any Circuit-Clerk is included in the invitation to send us these reviews, and we hope to have one from each county of the State.



A Last Word.

THE BAR has heretofore given considerable space to the discussion of the Constitutional Amendments, and it has presented the arguments pro or con for each separate amendment.

We now, as a last word, say that we are fully convinced that every voter of the State ought to give his support to all these propositions without exception.

Every one of them is a plain and simple proposition designed to accomplish a specific purpose—a purpose which has been demanded by the public sentiment of the State for many years.

If these things are not done in this way, we must wait indefinitely and incur the evils of a Constitutional Convention.

We cannot afford to allow these opportunities to pass.

Every lawyer in the State is under obligation, by reason of his better acquaintance with these amendments, to explain and urge their adoption by the people.

The Power is in the Bench and the Responsibility is with the Power.

THAT many and most of the failures and defects of our Courts are due to the presiding Judge is illustrated every day to those familiar with the Courts.

A striking exemplification of the responsibility of a Judge for the greatest bane of our judicial system, *Delay*, is just now being presented by a change of trial Judges in the celebrated Mollineux murder case.

Under the presiding Judge who sat at the first trial it was, we believe, the longest drawn trial on record in New York.

A different Judge comes to preside at this second trial, and after proceeding about a week under the influence of his business-like rulings, the prosecution has about covered the ground, and apparently covered it just as well, as it did during a month in the former trial. It is probable that the case will go to the jury inside of two weeks from its opening.

Perjury is another bane of the Courts. It is becoming so common that it is undermining the confidence of the public in the administration of justice. If the presiding judge had a mind to—if he felt the individual responsibility of his position for the integrity of our Courts as he should, he has the power and the opportunity as well as the responsibility for crushing out this evil almost entirely.

There is no Judge fitted for his place, whose training and experience will not enable him to spot the perjurer in the witness box with almost unerring certainty. When there is good cause for believing a witness has perjured himself in the presence of a presiding Judge it is his duty as well as his high responsibility to direct the prosecuting attorney to institute an investigation and see if sufficient evidence cannot be obtained to bring him to answer for it.

But how many Judges feel any responsibility for the integrity of the Courts beyond their own personal integrity?

Abolition of Capital Punishment.

AN Englishman who is probably the leader of the movement for the abolition of capital punishment is about to visit this country to study the sentiment on this side of the water, and possibly to inaugurate a movement for the accomplishment of his subject here. He announces his views on the subject in six propositions, as follows:

1. An irrevocable sentence needs an infallible tribunal. No tribunal is infallible. Innocent persons have been executed; the confession of the guilty came too late, the innocent suffered death, were legally or illegally murdered.
2. Juries hesitate to convict, even where there is some evidence of guilt, when they know that conviction will be followed by an irrevocable sentence.
3. It was recently found very difficult to select a jury in a supposed murder case because of the avowed objection of many to capital punishment.
4. Life punishment is more dreaded by criminals than death punishment.
5. The idea that the Bible enjoins death punishment as a universal law for all time is erroneous. The covenant made with Noah, and frequently quoted, "He that sheddeth man's blood, by man shall his blood be shed," was made at a special time and for a specific purpose, and it gives no authority for killing by law today. It is impossible for Old Testament laws, given in a past dispensation to individuals, to govern society and nations in the present.
6. Civilization and Christianity are alike opposed to death punishment.

In the United States death punishment is inflicted in various ways in different States, while in some it is abolished altogether; thus in New York and Ohio it is by electricity, Indian Territory by shooting; Porto Rico by the most barbarous of all methods, the "garrote;" in some other States by hanging, while in Maine, Michigan, Rhode Island and Wisconsin, death punishment is forbidden by law. This may be taken as evident that it is doomed in all the States, and when America takes this stand other nations will certainly follow, and death punishment become a matter of history.



"What is your name," inquired the Justice,
 "Pete Smith," responded the vagrant.
 "What occupation?" continued the Court.
 "Oh, nothing much at present; just circulating around," replied the prisoner.
 "Retired from circulation for thirty days," drily remarked the Court.

Our Most Dangerous Criminals.

N EITHER the worst tramps nor desperate thugs constitute the worst element of society. The criminals most dangerous to the public welfare are not in the slums or tenements. They are not hungry, ragged, nor ignorant. They have not been driven into a criminal life by any hard conditions of existence. They are often well born, well educated, and highly intelligent. They frequently possess much refinement and mental culture. It is common to find them gentlemanly in demeanor and unexceptionable in their social relations. The crimes which these men commit are not such as come up in the police court. They are not committed by assault or violent attacks upon individuals, but by secret and insidious attack upon the very foundations of civilized society.

To corrupt instead of overthrow one's government is not treason, but it is hardly less infamous. A citizen who has reached prosperity and wealth under a free and beneficent government deserves all the execration that the world gives a traitor, if he makes use of his wealth to undermine the integrity of those public servants who constitute the government.

Still another class is becoming too common, composed of men who pose as law abiding citizens and are looked upon by the masses as exemplars in their fidelity and loyalty to government and law, who will on occasion, not hesitate to join the mob or wink at the work of the mob, when it has overpowered the officers of the law and lynched a citizen accused of crime, and thus laid the basis for the overthrow of all government, and the reign of anarchy.

This class of "eminent citizens," we say, are becoming too numerous and need to "feel the halter draw" by way of diminishing the increasing product.

JUDGE MASON suggests that the coming meeting of the State Bar Association is a good date for all the Judges of the State to put in their appearance. They will all be off duty, and as it is seldom they can attend they ought to improve this opportunity. Every Judge in the State ought to be there, and we are almost ready to promise that they will be.



The following is an extract from an address delivered by Mr. Humphrey, before the Virginia Bar Association. Mr. Humphrey strongly opposes the election of the Senate by a direct vote of the people. He says:—

THESE is a disposition to underrate the Senate; to decry its character; to speak of it as a "rich man's club," and even to change the method by which its members are selected. Because several States have failed to elect, it is argued that there should be a direct choice by the people. But there is no reason in this. If the State cannot be well represented it had best not be represented at all. The moment the plan of the Constitution providing one method of selecting the House of Representatives, another the Senate, and a third, the President, is broken into, no man can foresee the changes that will occur. It may not be true that on every occasion the Senate has expressed the sober second thought of the American people but it is rarely done otherwise. On its floor the greatest of its public disputants have debated the momentous questions of national life; and I believe that without boasting we can claim that history shows no greater legislative body.



Mr. Serjeant Best was the best counsel in dowager cases that could be employed. It was said of him that owing to his West-of-England countenance, his blue coat with brass buttons, and his general appearance, the jury believed every word he said. Mr. Tilson used shrewdly to say, "never employ a cunning parchment-looking barrister, or a jury will as a rule always think he is deceiving them."

"The Orator of Secession."

AS the years go by we feel an increasing rather than a diminishing interest in the great events that led up to the war between the States. We are beginning to look upon these questions more calmly and more impartially. We are looking for truth wherever we may find it. We no longer believe all the intelligence and integrity of the country were concentrated in any particular spot or section. We read with interest about Wendell Phillips and with equal interest about his great opposite, in oratory and political thought, William Lowndes Yancey, "The Orator of Secession."

Governor Perry speaks of him in the highest terms as follows: "I knew him well and loved him most affectionately. He had many rare and noble qualities of both head and heart. He was full of genius and talent, and endowed with high gifts of oratory. In disposition he was kind and affectionate, warm and generous, and devoted to his friends. He was a very handsome young man, with a bright, cheerful face, ever inspiring confidence and good feeling. He was rather under ordinary height and well proportioned, with great activity and strength. His manners were not only pleasing and polished, but really fascinating, and no one could be in company with him without feeling kindly towards him; but with all his talents, attractions and brilliancy, he was not a man of wisdom, or judgment, or stability of character. He had strong feelings and impulses, which generally controlled his action and judgment. He was a man of high spirit and dauntless courage. His impulses and his passion involved him in a great many difficulties of a serious character."

Mr. Yancey was one of the greatest of southern orators. He belonged to that class of ante-bellum orators who were popular in the South, of which W.C. Preston, George McDuffie and W. C. Breckinridge were conspicuous types. The last named still survives and exhibits the style of oratory which was characteristic of that line of southern orators before the war. They had a fiery, impetuous style. Their delivery was animated, their diction flowery, their temperament ardent, and their subjects exciting. They felt what they said, and they were perfectly willing to support their views with their lives, if necessary.

Many of them were born orators. They delighted in public speaking. They were frank and open in their disposition. Most of them were the very soul of honor. They were gentlemen in manner, style and behavior. They were well educated, and had added to the stock of knowledge by travel abroad. Socially they were hard to surprise. They were admirable talkers, and had always on hand a rich stock of anecdotes and interesting incidents. Mr. Webster, particularly, appreciated these qualities in them, and cultivated and enjoyed their society. Mr. Calhoun, though sharing with them some of these qualities, did not belong to this type. His speeches were too severely logical, were not sufficiently ornate, and were too barren of illustration and imagery. He did not pay that attention to manner and delivery that was characteristic of them. He seemed to regard matter only, and allowed the form of his speeches to receive but little of his attention.

The ante-bellum southern orators, of whom I have been speaking, have almost become extinct, and a new style of speaking has become more in vogue. Our speakers now are more like those of the North. They are more matter-of-fact in their style and delivery. They come right down to the point of issue. They do not deal so much in imagery and figures. They are more argumentative in style. The spirit of the age and the change of time and circumstances have revolutionized the style of oratory. Before the war politicians and public men had more leisure than they have now. Many of them were wealthy and could afford to take their time. They were not pressed as they now are to make a living. Now they have to bestir themselves or they will find themselves left in the lurch. And what we say of the speakers themselves applies with equal force to the people who constitute the audience. They have not time to listen to speeches which do not drive right at the central point. They have their families to support, and they want facts rather than entertainment. They have got to catch the next train—a train which was possibly not in existence before the war. Where we had one railroad then we have possibly three now. The weekly and daily press, too, have had a great deal to do with this change in our style of oratory. It is not necessary to elaborate now in addresses before the people. We can throw out a suggestion and leave it to the newspapers to do the rest.

The History of Human Progress.

BY THE HON. THOMAS B. REED,

Former Speaker of the House of Representatives.

WE make the following excerpts from an address recently delivered by Hon. Thomas B. Reed, at the Centennial of Bowdoin College. We have not space for the entire address, but Mr. Reed is always interesting and original and the nuggets we select from the full address are worth reading in any connection:

All assemblages of men are different from the men themselves. Neither intelligence nor culture can prevent a mob from acting as a mob. The wise man and the knave lose their identity and merge themselves into a new being. The habits of individual life are broken up, and the safeguards as well. In our every day life we have to be in constant control of ourselves. We know our limited power, and do not propose to attempt what we cannot do. As part of a mob that limitation is lost. We feel that we have the power of all, let ourselves loose, and override our acquired limitations. Our reason at such times will not work at its best, for our habits are broken up, and human reason for everyday life depends on habits. A mob does not always do wrong. It sometimes rises to loftier heights of self-sacrifice than any individual in it would be capable of. When the French Assembly removed from themselves all inviolability and let in upon themselves the savagery of France, it was an act of wonderful self-abnegation whatever you might think of it as an act of sense. The next day not one man approved of what all had done the day before with high heart and enthusiastic conviction. The mob need not be large nor need it be even a mob. Many a jury has rendered a verdict which not one man of the panel has fully approved of. This singular effect of men, upon men, this fusing of many natures into one, with all its terrible consequences, is at the basis of the life of our race. In a great parliamentary assembly—none greater in the world—I have more than once seen three hundred men on the verge of personal conflict. Each one of those men had been selected out of ten or fifty thousand voters, a man of mark in his community, and neither ignorant nor brutal.

What they might have done without the eye of the world upon them has always been the subject of speculation and wonder. These scenes always occurred when the thermometer was a hundred in the shade, and each man felt that a vote either way on the question before him was a peril to his party or to him. The same story can be told of every like assembly in the world. The disorder was not American. It was human.

* * * * *

Although mobs are no part of the regular course of human events, yet their actions illustrate certain phases of human possibility. They need not be ignorant or brutal, though they often are both; striking with wild hands and unthinking, uncontrollable violence. In a certain sense the Assembly of France, depriving itself of the inviolability which human wisdom after much experience had established for legislative bodies, was a mob even while it was doing a self-sacrificing act.

The good men cannot have them made just as they wish, nor, thank Heaven, can the bad men. Professor Gunton says that the price of all things is fixed by the cost of the most expensive part of the absolutely necessary supply. Party platforms cannot strike the high level of the most sensible men, but must reach down to the lowest level of the necessary voter; hence if you wish to raise platforms you must raise the lower strata of the parties. My purpose is not to complain of this; it is only to state it. This is a practical world. What we long for seldom comes to us in full measure, and it is wiser to do what we can if we cannot do what we would. Nevertheless, there are cases where an honest man will have full measure or dash the cup to the ground. When the Burney men defeated Henry Clay they defeated the man who was the nearest to their own thought, but they were determined on the whole of freedom and nothing less. And they had it, after due years of waiting.

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At the opening of the civil war there was a period which illustrates the way in which men show their dependence upon each other, a period which was a revelation of the real place of power. For months Congress did nothing but make speeches because of the impossibility of knowing what would be supported. When Congress did start it

was because the people had made up their minds. Congress did not lead; it was pushed. One of my first recollections in Congress is of the utter consternation we were put into by motions for suspension of the rules, which forced us to declare our sentiments on currency questions, about which we then knew pretty nearly nothing, and the heathen outside were raging and the people were imagining a vain thing. What was of more consequence to us, we were liable to lose our seats if we answered wrong.

Our Constitution and system of government are in full recognition of the fact that our people are to govern, and also of the equally important fact that they should have a chance to learn how to govern. We elect a House every two years; we elect a President for four years, and a Senate for six. Why are there these differences? Why should not the people have opportunity to change all of them every two years and make a clean sweep as it seemed to them good? Simply because wisdom is not born in an hour. Our forefathers believed that the discussions involved in changing during three different periods the executive and the two chambers would involve also an education of the whole people which would make their judgment sound. Three times within my experience the judgment of the people of this country has been changed on three great questions. That the final judgment was correct is not for me to say in this presence, but, as a rule, I think I should prefer the judgment of men after discussion rather than without discussion. It is a great thing to have institutions so framed that the people can educate themselves before they are called upon to act. Time and truth against any two is sound doctrine, but truth without time has not an even chance with error.

I have said that one source of astonishment in reading of the past is the late arrival of the truth of the most obvious kind.

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It seems almost not to be endured that, after full reasons have been given, three hundred or five hundred years have to roll on before the race has adopted a truth of life and practice which is now so clear that no deviation from it will be tolerated for a moment. The stone that was once rejected then becomes the head of the corner, and we worship where our ancestors scoffed.

When we declaim with fervor and satisfaction that the eternal years of God belong to truth, and see in ecstatic vision the triumph

of the future, we seldom have it in our thoughts that the reason why truth is given the eternal years of God is because she needs them every one. Error may die writhing amid its worshippers, but not until long years of triumphant reign surrounded by all the glories of this world. We have no test of truth but eternity. Until truth is driven in upon all our senses and until the large majority of men are with us we cling to our ignorance. Truth does not prevail by being known to the wise; it must penetrate to the depths of the human race to be prevalent. The great intellects even and the great sages cannot enjoy truth until we all have it and until it has been reduced to a habit of life.

To me it seems apparent that the final cause of this fact—the reason of its existence—is the unalterable determination of the divine powers that the human race shall be kept together. Why the differences which now exist do exist no religion or faith has quite explained. But that these differences shall become less seems even to the wayfaring man the eternal purpose.

The newspaper is thought to be a great elevator, but the reason why it is so is usually lost in declamation and glittering generalities. The newspaper does its work mainly as a business institution. When the owner of a great newspaper was asked if it was for sale, he replied that it was—"Daily, at three cents a copy;" and he said more than he meant. The ideas of the editors are not without their relations with the counting house. This means, in substance, that the newspaper to sell itself must be near its audience. For my part, I am not sure this is unfortunate, for we all go from one half truth to another, and it is better to start a discussion anywhere than to keep silent. Even the political orator in a campaign does not at all times utter absolute truth.

* * * * *

Four hundred years ago, when Henry VIII was crowned, he really entered upon a plenitude of power which made him the arbiter of life and death, the fountain of honor; free to do all the strange things he did, master of life and death and of all things temporal and spiritual.

By the Pope's recognition he became defender of faith, and was believed by mankind to take his title by divine right. Of course, there were limitations to his possibilities, as there is and always has been to all despotic powers; but that limitation was so far beyond any-

thing that would be tolerated today that we may well make comparisons without noticing the limit, and marvel at what four hundred years have done for that portion of the race in which we are most interested.

Henry VIII has been dead for centuries. His thoughts have not survived him. They have all passed away. Yet tomorrow, but for one of those mournful events which so often in human history teach the lesson of the nothingness of mortal glory, there would have been unrolled before a waiting world a pageant which would have moved the hearts of men on all the oceans and shores of the habitable globe. In the cathedral abbey of Westminster, amid the sculptured tombs of the mighty of other days, surrounded by living lords and ladies, glittering with jeweled coronets, in the presence of statesmen and famous men and lovely women, under emotions called out by the memories of the exalted dead who lie there in commingling dust—the exalted dead who have for many ages and in all lands made, for good or ill, the history of the world—the King of England would have received the crown which in old days would have given him the right to rule over and determine the destinies of 350,000,000 men. Though this coronation would have stirred the sentimental natures of men no less than in the days of Henry VIII, the power of Henry VIII could never have descended to Edward VII. That power has gone from earth with the vanished centuries. The pageant would have been but a vain show, a waking dream, with no more reality than the dreams of sleep. The king uncrowned or gorgeous in his crown and his velvets of radiant hue is no longer the fountain of honor; right is no longer divine, and he is no more the lord of all things temporal and of all things spiritual. The power is elsewhere.

In the natural course of human affairs there will be, sooner or later, an event unheralded by the blare of trumpets and by martial music. The Marquis of Salisbury will say to the king, whoever he may be, that he will no longer be Prime Minister of England, and that some other statesman of mark, either of his own party or the other, should be summoned to form another government. The king will have no choice, and in due time the new government will take charge of the destinies of England. This will be a scene of real life, and will mark to all thoughtful minds the march of civilization from Henry VIII to this day.

I have dwelt upon the darker side of the history of human progress, not because the other side is not bright with the possibilities of a better life' but because we all flatter ourselves about it overmuch. There is no lack of those who glorify the advances and forget the long years of struggle. There are those also who make past advances an excuse for present rest. Some of our lessons we have only half learned. We go back to the bad past on very slight provocation. There are places in the United States where prevails the right of private war which five hundred years ago had its grave in France. But before this audience I have no right to encroach upon modern history. All it would be proper for me to do would be to insist that righteousness has not yet been firmly established even here, and duty still has its call upon us everyone.

But is it possible, in this complex mystery of human progress, for individual man to do anything? Are we not like the bees governed by the spirit of the hive, carrying us whither we know not? Are we not the victims of destiny, with our lot marked out for us beyond our will and ken? Is not this a world under control of the survival of the fittest—not the fittest to enjoy the society of the Almighty, but the fittest to trample on each other? I do not believe it. Survival of the strongest may be new to science, but it is not new to religion. The strong, remorseless arm striking down the weak and possessing the earth, the un pitying tramp of the horse hoofs devastating the land, are known to the years that have gone, and they filled the thoughts of men; but they are no longer supremely prevalent on earth. Justice and equality and the rights of man have an ever-increasing sway, and the power of the mighty in arms is every day more and more mitigated by that justice and love which satisfies the longings of the human heart better than even riches or superiority or power. Whatever contribution any man makes to humanity and justice will not be lost, but will be gathered up and be among the treasures of the Almighty.



The First Judicial Tribunal of the World.

The Hague Court, which it is no misnomer to call the most distinguished judicial tribunal in the world, has signalized its real existence, and given a hint of its dignity and power, by entering a judgment in its first case, for one million dollars in favor of Uncle Sam against Mexico. We feel a special pride in the doings of this exalted court because it owes its existence to the united sentiment of the legal Profession of this country. It is the most conspicuous mile stone in the march of modern civilization, and is suggestive of greater things in the future than any tribunal that was ever organized, or any other single movement which the human race has conceived in modern times.

It will be of interest to members of the Profession to know some of the details of the opening of this great court. We herewith extract from an article by the distinguished writer, W. T. Stead, who was on the ground, some items of special interest:

On September 15, the first case which has been referred for adjudication to the Hague Court was opened. The event, which will probably be remembered in history long after all the other items of intelligence which fill the newspapers at the present moment are forgotten, was marked by no ceremonial. The question at issue that has to be decided is comparatively small, and the dispute which will be settled this month would be speedily forgotten by all mortal men were it not that it will be remembered in the history of the human race that it was for the settlement of such a dispute that the first court under the Hague Convention was opened in the capital of the Netherlands.

There is a strange fitness in things. For three years, since the Conference of Peace broke up, no use whatever has been made of the convention drawn up by that parliament of peace for the amicable settlement of international disputes. For that delay the British Government must bear the whole responsibility. The supercilious refusal by English ministers to accept the plaintive and oft-repeated entreaty of President Kruger to settle their dispute with the South African republic on the lines of the Hague Convention administered a

blow to the cause of arbitration the full extent of which is very imperfectly realized

It would have mattered little if war had been entered upon by some other power than England, say, for instance, by one of the powers which acquiesced reluctantly, and under what may be regarded as moral duress, in the framing of the arbitration convention; but that England, who, through her distinguished representative Lord Pauncefoot, had taken the lead in affirming the principle of arbitration before the world, should have been the first power to trample the principle under foot the moment she thought that she could attain her ends by a cheap and easy war, gave courage to all the enemies of arbitration to heap ridicule upon the principle which they had reluctantly accepted, and to do their utmost to bring the court at The Hague into ridicule and contempt. It is an open secret that some, at least, of the governments who signed the convention under the constraining influence of the Czar's prestige and popular enthusiasm for the cause would be very glad if the Hague Court were dissolved.

There was also a natural reluctance even on the part of some governments which were not so hostile to the cause of arbitration to be the first to call the court into active existence. Now, however, the war being over, it is extremely satisfactory to know not only that the court is to sit to adjudicate an international dispute, but that the initiative should be taken by the United States of America. The new world is the first to take advantage of the new court established by the parliament of peace for the settlement of the disputes of the nations.

It is also good that the dispute should be one between two republics. In this respect republics are setting an example, for it is always well for republics to set an example to monarchies.

The first question which is brought before the court,—although in itself a mere trifle concerning the ownership of a capital sum of something over \$700,000,—is one which possesses an historical and religious significance of the first rank.

HISTORY OF THE PRESENT CASE.

The Church having failed to perform its manifest duty of acting as peacemaker and arbiter of the disputes of the world, the layman have

at last, after the lapse of many centuries, taken the task into their own hands, and the Hague Tribunal is the work of laymen. It is constituted by temporal governments, from whose deliberations the spiritual power was sedulously shut out. But what is the first question that is to be brought before this lay tribunal, constituted by secular governments for the settlement of international disputes? It is a question of ownership of property which was originally given by pious founders for the extension of the Catholic Church. The matter in dispute, stripped from all question of encumbering detail, amounts to this: When the frontier of Mexico stretched northward, so as to include the whole of the present State of California, certain sums of money were given to the Society of Jesus for the purpose of carrying on its operations in California. Toward the close of the eighteenth century the then Pope suppressed the Jesuits, and the society, being driven out of Mexico by the faithful Catholic government of that date, lost control of its possessions, the administration of which was then undertaken by the Mexican Government.

The capital sum involves about \$315,000. The Americans plead that Sir Edward Thornton's award settled once for all the justice of their claim to this sum, which is one-half of the total value of the property originally left to the Jesuits. The Mexicans, on the other hand, deny that Sir Edward Thornton's award bound them in the future. It dealt only with the question of the arrears up to 1869. The Americans contend that by Sir Edward Thornton's award the question became what is technically called *res judicata*. This is denied by Mexico on various grounds.

PERSONNEL OF THE COURT.

The question would never have arisen if it had not been for the action of the Pope in suppressing the Jesuit order at the end of the eighteenth century. The whole dispute turns upon whether a certain sum of money shall or shall not be allocated to the use of certain Catholic communities in the State of California, or whether it shall be devoted entirely to the use of Catholic communities in the republic of Mexico. Yet this question, which would seem to be eminently one for the decision of an ecclesiastical court, is raised by diplomatic action between two governments, one of which is freethinking and the other Protestant, and its decision referred to a court primarily

consisting of four arbitrators, one of whom, M. de Martens, is a Greek-Orthodox; another, Sir Edward Fry, is an English Protestant; a third, M. Asser, is a Jew; and the fourth, M. Savornin Loman, is a Dutch Protestant. Should these four arbitrators be unable to agree, the question will be referred to an umpire, whom the four,—who are respectively Greek-Orthodox, Jew, and Protestant,—agree among themselves to nominate. Should they decide that the question is not a *res judicata*, this heretical court will have to decide, among other things, whether moneys left to the Society of Jesus in the eighteenth century were given for political or religious purposes, and whether the Catholic Church in English-speaking California is the same Catholic Church as existed there when it was ruled by Mexico. Yet, in the opinion of the Catholics themselves, it would be difficult, if not impossible, to secure a tribunal more certain to decide the case upon its merits.

I had the pleasure of visiting The Hague in August, and saw for the first time the premises which had been secured for the use of the court. It is a building in the Prinzengracht, fronting on a canal, which is shortly to be drained, and the space now occupied by the canal converted into a broad esplanade. The premises are taken on a five years' lease, at the remarkably low rent of \$500 a year. The house does not stand by itself, but has a prettily laid out garden in the rear. It has been fitted up for the use of the court, and on the walls are hung portraits of the sovereigns, prime ministers, and plenipotentiaries who took part in the founding of the court. The room where the council meets for the purpose of auditing the accounts and superintending the operation of the bureau is furnished with chairs, each of which bears the name and the arms of the power for the use of whose diplomatic representative it is. Another room is set apart for the library, for the replenishing of whose shelves the modest sum of \$200 a year is allocated by the economical council. Besides the court room in which the court will sit to adjudicate upon disputes brought before it, there are also retiring rooms, secretaries' rooms, and other necessary accommodations. The bureau as an office, is commodious, supposing that arbitrations are occasional; but if the practice became general of referring disputes to the adjudication of the Hague Tribunal, it is quite evident that the present premises

will be insufficient and inconvenient. But the prudent Dutch Government and the somewhat skeptical members of the council decided to proceed tentatively, and so they have provided for the headquarters of the tribunal modest premises which can be procured at a minimum cost, but are in singular contrast to the hopes entertained by those who founded the Hague Tribunal. It was perhaps well to walk before we ran, and it is better to begin on a small scale at first, rather than to launch out on to a great expenditure such as would certainly be required for the Supreme Court of Nations.

Much will, of course, depend upon the result of the first arbitration. If it passes off well, and is rapidly followed by other appeals to the same tribunal, we may anticipate that quarters more in keeping with the importance of the court and in a more convenient location will be obtained, and that the new premises will be furnished and equipped with the best library of international law to be found anywhere in the world. The need for such a court, and the need for strengthening the court which has already been established, so as to take note of infractions of the conventions drawn up at the conference, is obvious to all who take an interest in such questions.



THE time fixed for the next annual meeting of the State Bar Association—the 30th and 31st days of December—is near at hand. Only one more issue of THE BAR before that meeting, and in that issue we will endeavor to give our readers some definite information as to what is going to happen at that meeting. It will be in many respects, one of the most important in the history of the Association. And we believe it will also be one of the most largely attended. It will not conflict with any court in the State, and for that reason it might not be amiss to say that the date of this meeting should be made the fixed time for annual meetings. We will see how it works.

Commercialism in the Practice of the Law.

THE strenuous life has become so intensified that the legal profession is no longer free from the taint of the commercial touch. How to make money out of legal business, and how to get legal business, out of which money can be made, are questions uppermost in the minds of many a practicing attorney to-day.

The questions themselves are not new. But the answers to them, as they appear in actual practice, if not new, too frequently reflect no credit on the bar. And the struggle for actual existence in these hurrying, bustling times, makes some excuse for the practice plausible, if not justifiable.

The disposition, for instance, to go after business, to solicit individuals, firms and corporations, for litigated matters is one of the "commercial" features of the profession which is widespread, is accepted as inevitable under existing conditions, and is tolerated by members of the profession, who are regarded as both able and "reputable."

Nor is this the only form of "commercialism" in the law which is growing and adds little to the due administration of justice. The disposition to take up, on contingent fees, cases which have no legal merit whatever, particularly cases of personal injury against municipal and other corporations, is an evil of no small proportions.

Of course, the strenuous condition of the world at the present time tends to drive every one into the business of making money. It is unfortunate for the legal profession that this is so. For it is no mere trade, nor is it an avenue that leads, or should lead, to wealth. There is, or at least there should be, some attempt to exalt this honorable profession out of the scramble for mere pelf. This does not mean that the lawyer should not receive his just and fair compensation for services rendered. His is a laborious life, if his professional duties are fitly discharged, and he is entitled to

his reward in dollars and cents as much as the member of any other walk in life. Our contention is not for gratuitous services by any means.

When however, the profession is employed for the sole purposes of a money-making institution, it ceases to meet the lofty aims for which it was designed, tends to lose the respect of those whose opinions are worth having, forgets the behests of justice, denies to the public the right of property under the law, if not of liberty also, and makes of the due administration of the law the merest mockery.

Bench and bar and bar associations can do much to create a healthy public opinion which will discourage and denounce this nefarious business. So-called "reputable" lawyers should be brought promptly to book for such questionable practices. And persistence in "commercialism," which, of course, should be first specifically defined, should be sufficient to warrant disbarment.

The justification for this radical course is found in the fact that a multiplicity of suits devoid of merit, often having but a plaintiff in name, only have, or should have, no place in the halls of our courts. It is possible to weed them out by some such method as is here outlined.—Exchange.



AN old and well known traveller, who has recently settled in Chicago, while coming in from Pewee valley the other afternoon told an interesting story about Henry Clay, the great Kentucky statesman. The story teller in his youth lived in Mr. Clay's district during the time when Henry Clay was at his prime as a lawyer.

"A man was being tried for murder," said the narrator, "and his case looked hopeless indeed. He had without any seeming provocation murdered one of his neighbors in cold blood. Not a lawyer in the country would touch the case. It looked bad enough to ruin the reputation of any barrister.

"The man as a last extremity appealed to Mr. Clay to take the case for him. Every one thought that Clay would certainly refuse, but when the celebrated lawyer looked into the matter his fighting

blood was roused, and, to the great surprise of all, he accepted.

"Then came a trial the like of which I have never seen. Clay slowly carried on the case, and it looked more and more hopeless. The only ground of defence the prisoner had was that the murdered man had looked at him with such a fierce, murderous look that out of self defence he had struck first. A ripple passed through the jury at this evidence.

"The time came for Clay to make his defense. It was settled in the minds of the spectators that the man was guilty of murder in the first degree. Clay calmly proceeded, laid all the proof before them in his masterly way, then, just as he was about to conclude, he played his last and master card.

" 'Gentlemen of the jury,' he said, assuming the fiercest, blackest look and carrying the most unlying hatred in it that I have ever seen, 'gentlemen, if a man should look at you like this what would you do?'

"That was all he said, but that was enough. The jury was startled and some even quailed on their seats. The judge moved uneasily on his bench. After fifteen minutes the jury filed slowly back with a 'Not guilty, your honor.' The victory was complete.

"When Clay was congratulated on his easy victory, he said:

" 'It was not so easy as you think. I spent days and days in my room before the mirror practising that look. It took more hard work to give that look than to investigate the most obtuse case.' "—*Louisville Courier-Journal*.

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THERE are many men of many minds, but how any intelligent lawyer could be of any other mind than favorable to the adoption of the judicial amendment proposed to the constitution, passes all understanding. Yet we have an example of a lawyer, who is also a candidate for the State Senate, going into the State press in opposition to this and every other amendment in sight. We are free to say that his arguments would not satisfy any other mind than his own, however. But it is wonderful upon how small a pivot a constitutional kicker will essay to exercise his proclivity.

A Startling Case of Conflict of Evidence.

Beckley, West Va., Oct. 15th, 1902.

EDITOR BAR:

FOR the benefit of the profession, and especially to note the uncertainty of even direct evidence, I desire to call attention to a peculiar criminal case, which recently interested the community about the county seat of Raleigh.

A young woman about twenty years of age was shot and mortally wounded at the home of Mr. and Mrs. H, where she was living as an inmate of the household. This occurred on the 22 day of Sept. 1902, at a distance of six miles from the court house, in the midst of a fairly well settled neighborhood. The victim lingered for two days, and repeatedly declared to the attending physician and others that she had been shot by one Charlie Willis, a young workman of the neighborhood, who had previously known the girl. Her dying declaration was to the same effect. The shooting occurred at the middle of the day. Mrs. H. who had gone on a trip to a country store, was the principal witness for the state. Willis was arrested, and his examination was held before the local Justice in the Circuit Court room of the Court House in the presence of a large and attentive audience.

In addition to the girl's declaration, Mrs. H. testified positively as to the identity of the prisoner with a man whom she saw leaving her house after the shot. She testified in the most circumstantial manner that as she returned home and had reached the entrance to the yard she heard a shot, and directly afterwards, saw this man leave the house and recognized him fully. And that upon entering the house she found the girl wounded and leaning against the bed. It was further stated that Willis had quarreled with the girl a short time previously.

To meet this terrible and seemingly conclusive mass of evidence the prisoner showed that on the day of the murder he was firing the engine for a well machine at work at a point four miles distant. His two companions at the machine swore that he was not out of their sight the whole day. The party had an early dinner in a house near by, where he sat down at the table with six people. Two other persons in the house would testify to the same thing. Thus the witnesses stood eight to two in favor of the accused. At the close of

the examination he was discharged. The case is unique in my brief experience. Had this man been traveling alone, or hunting, in that vicinity, or intoxicated, upon the day in question, the result might have been one of those rare instances where an innocent man suffers the punishment due to another.

Respectfully,
X. A. X.



IT is a very difficult feat for a Judge from his exalted position of dignity and responsibility to descend gracefully into the role of the way and the wit in rendering judicial opinions. An exchange refers to an example of this kind:

The high and solemn Court of appeals of Indian Territory, taking their tone from the tuning fork of some of their judicial elders, in a recent opinion indulge in the following: "As to the sixth assignment of error, the contention of appellant is that the fall of a heavy dew is an act of God, which should relieve a common carrier from its liability. We cannot concur with appellant in this contention. Had the dew been of that brand well known as 'Mountain Dew,' it might have affected the engineer and fireman, but not the engine or corporation itself, to the extent of relieving it from the obligation of its contracts."

Well, now, at first impression, it might occur, to the irreverent reader at least, that the "brand known as 'Mountain Dew'" had affected the judicial merry-maker who flipped off the opinion—and that too, to the extent of relieving him from responsibility had he committed murder instead of a rape upon the proprieties. It would be well for judges of courts of last resort to confine themselves in their opinions to dispassionate and dignified expressions, as their attempts at pleasantry are, as a rule, either inept, agonizing or anile.

The Tombs Angel.

ONE of the most singular characters that has attracted the attention of the public in recent years was a woman who was known in the Criminal Courts of New York City as "The Tombs Angel." She was a lady of culture, refinement and prominent family, but gave her life to relieving the most degraded inmates of the city prisons. Her advice was sought by the judges of those courts in many instances in dealing with prisoners. She was one of the victims of a hotel fire recently in which several lost their lives. The courts adjourned in honor of her memory. We extract from *The Outlook* the following personal sketch of her career.—Ed. Bar.

During the years that I have lived in New York, moving here and there in quest of knowledge of it, and reading the daily papers more or less diligently, I had seen an occasional reference to the Tombs Angel. It was always a very incidental reference, usually a brief statement that some woman or young girl, picked up by the police, had been given into her charge. I would not now recall these references were it not for subsequent events. They made no conscious impression upon me at the time, but now I know that I had formed a vague conception of her.

The Tombs Angel was, in my mind, a large, good-natured woman, perfunctorily sympathetic, without any culture and perhaps with no education, performing her ostensibly benevolent duties because she was paid to, performing them pleasantly because she was large and amiable, accustomed to crime and degradation, and not too deeply touched by it.

When the fire occurred in the Park Avenue Hotel last winter, I learned that the Tombs Angel was Mrs. Rebecca Salome Foster; that she had lived there for a number of years, and was killed in the disaster. This was in itself a surprise, but the tone of the newspapers in recording her death was a greater one. The usual newspaper obituary is, at best, perfunctory. However great or good the deceased may have been, the records of his deeds, the eulogy of his character, are usually gleaned from books and files and put into form by some one assigned to the work. It is to him a part of the day's demand

He writes it as he would an account of a Board meeting. There were no "obituaries" given to Mrs. Foster. The hotel fire was made little of. Her death was the tragedy. Every account was a lament—sincere, almost pathetic. There was a note of sorrow, simple and genuine, seldom found in the columns of the newspapers. Such a note is struck when the President is murdered, for then the whole country, by horror of the deed and by the magnitude of the event, is shocked out of its indifference. It is a simultaneous feeling by a whole people that stirs in the blood of the scribe.

The day before Mrs. Foster was killed she was unknown to hundreds of thousands of even the people of New York. You could have cried her name in vain up the crowded Broadway and through the shopping district, on a bright day, when all the multitudes were out. But even the stranger reading the accounts of her that day must have been moved by them, and felt, without knowing, that they were justified.

Her death was not treated as a sensation, a good story thrown by fate in the reporter's way to-day, to be forgotten to-morrow. It was the singular tone of respect, bordering on veneration, that stirred my interest. I wanted to know the woman we had lost.

The police reporters seldom call at the offices of the newspapers they represent. There are two or three old buildings on Mulberry street, across the way from Police Headquarters, where they have their desks and offices. They make the daily rounds of courts and officials, looking up certain captains, detectives, or roundsmen, in quest of special stories, dropping into the Tombs to see an interesting prisoner, and when the details of the day's criminal news have been gathered, they return to their desks in Mulberry street, write what their paper expects, and send it in.

I found a friend of mine at his desk one afternoon after his routine work was done. He was smoking his pipe, his feet on the windowsill, his eyes fixed in reverie on the ugly front of the Headquarters. He has occupied this corner for over fifteen years, serving one of the old evening papers. He is looked upon as one of the best-posted newspaper men in all criminal and police matters in the city, and I confidently expect to get from him a complete picture of the Tombs Angel, and incidents enough to give the picture life.

"Did you know Mrs. Foster?" I asked.

"Yes," he replied.

"What was she like?"

"She was a fine woman."

"I know, but in what way?"

"Why, in every way. She was the best woman I ever knew."

"Come, now old man," I urged, "I want to know about her. You would not describe her in that way in your paper."

"I wouldn't say much about her in the paper. She wouldn't like it."

"Well tell me some of the interesting things she did—not exceptional, you know, but characteristic."

He puffed at his pipe and thought for a long while.

"I don't think I can do it," he said, at last. "She never talked about the things she did. We never thought of going to her for a story—It would do no good."

"And still she was popular with the reporters?"

"She was one of the best women I ever knew."

And this was all I could get out of him.

William Travers Jerome, now District Attorney for New York, was for a number of years one of the judges of the court in which Mrs. Foster served as probation officer. I have been acquainted with Judge Jerome for some time, and I know him to be a close observer. I found him recently at his East Side residence.

"I want to know all about Mrs. Foster," I said. "What sort of a woman was she? What did she look like?"

"She was a small, nice looking woman, very quiet and unobtrusive. And yet that is hardly right, either, for she was very active and always busy. But she went about her affairs in a direct and simple way. Her value to the court itself was in the fact that she had rare good judgment. You find not a few philanthropic people, and not a few people with good judgment, but it often seems as if these two elements were not found in the same person.

"A woman would be brought up to the bar, plead guilty, and be remanded. We would ask Mrs. Foster to look into the case and report to us. She would find out where the woman worked—what her life was, what her interests were, who her people were, what her surroundings had been, how she came to get into this trouble; and her

judgment was so good, and her experience so great, that it was the very rarest thing for any of these people to be able to deceive her. She was, of course, constantly told untruths, but she was sagacious enough to detect the fact that they were untruths, so that when she reported to the court, the court felt that, as far as it was possible to ascertain them, all the facts of the case had been learned, and that it might act with perfect safety upon her report, and the question whether sentence should be suspended or imposed, or where the prisoner should be sent, was generally decided by her."

"But, with all her good judgment," I interposed, "she must have been deeply sympathetic."

"I suppose she was," he replied. "A great many women who endeavor to do philanthropic work of this kind are unselfish and warm-hearted, but they are frequently misled by the class of people with whom they have to deal, and their statements to the courts can rarely be relied upon—not that they willfully falsify, but they are incapable of ascertaining the real facts of the case. Their duty seems to them to be rather to extend sympathy to the person in trouble than to make a thorough investigation of the person's case, so that it can be dealt with in the wisest way, looking not only to the good of the individual, but the general good of the community."

"It was not an infrequent thing to have Mrs. Foster report that the person was of such a character that she did not think there should be a suspension of sentence. And frequently, before the prisoner was convicted, she would make an investigation, and if judgment was suspended she would, especially in the case of young women, take them into her charge, procure situations for them, and exercise a general supervision over them for a considerable time, helping them wisely. She had a little place, up somewhere on the Sound, where she took some of these. For others she would procure lodgings, and frequently, when a woman was sentenced and sent to prison, she would look out for her children; and where men were sentenced she would look out for their wives, procure means to help them—give them food and clothing, procure work for them. Her ministrations were not by any means devoted entirely to women, although they were the principal objects of charity. She worked at all times—in the heat of summer and the cold of winter. She would go to the very limit of her strength, until, absolutely exhausted, she would

faint. The court officers were all very fond of her, and when she was overcome some big policeman would lift her up and carry her to a place of rest as tenderly as though she were a baby.

"Her absolute sincerity and purity of motive impressed itself upon every one and led them to trust her. She would never take any money from the judges. Lots of times I have tried to give her money for some particular case—where she had made expenditures to take care of the family while the man was in jail. She would say: 'No, I cannot take any money from any of the judges. I know the judges who are here now would not think I was coming to them with the hope of getting some, but there might come judges here who would not feel that way about it. They would get to look upon me as a nuisance, and they would feel they ought to offer me money.'"

Here was a little light on the character I was seeking to know, but I felt that it was only a partial revelation. Good judgment and an insight not readily deceived were the qualities that had impressed the judges. They might make her a valuable ally to the court, but they could not explain the reason for her labor. No woman would have devoted years of her life to such exhausting toil in so lugubrious a world, without pay, simply for love of exercising her powers of discrimination. The judge put these first, but it was evident that they must have been incidental so far as she was concerned. They served to make her more effective in what the deeper qualities of her nature prompted her to do.

"Where did she get the money that she used? She did not receive much as probation officer, did she?"

"The law creating probation officers was passed only about a year ago. She was doing this work many years before that, and she served out of pure benevolence, without pay. I don't know where the money she spent came from. I think she had some means of her own."

I went to the iron-barred door of the Tombs, and was admitted.

The sheriff received me in his dingy office, in the rear of a long, narrow room, an ill-lighted, poorly ventilated passage to the cells.

The sheriff, a big-boned, heavily built Irishman, met me with a challenging stare from his suspicious, cold blue eyes, but when I told him my errand his attitude became less harsh and forbidding.

"How long have you known Mrs. Foster?" I asked.

"Ever since I have been here. I've been around the Tombs here, one way and another, for about twelve years."

"And you saw a good deal of her?"

"I saw her about every day. She came here every morning, regular as clock work."

"To see the prisoners in general?"

"Well, there was always one or more particular cases she was looking after, and then there was always a lot of ex-prisoners and dead-beats and people in trouble hanging around outside for her. She always came around here to see them. Of course, if it was cold or stormy, we let them wait inside for her."

"What did she do for these people—get them work?"

"Most of 'em didn't want work. Of course, if they did, she would find 'em something. But most of those hanging round here were dead-beats looking to her for a stake."

"What did she do with them?"

"Oh, she always staked 'em to something—a quarter or a half or so. There was a fellow named Appo—an ex-convict and a regular Bowery bum—used to show up about so often, and get a half or a dollar off her."

"Fooling her with promises of reform?"

"Not much. You could'n't fool Mrs. Foster. She was on to 'em all right. She never talked reform to such people. Just slipped a half or a dollar into their fist on the quiet, with a joke or a pleasant word, and told 'em to come and see her again."

"What was her idea?"

"Don't know as she has any idea. Talk don't do those dead-beats any good. She seemed to think a lot of them in a queer kind of way—kind of joking and tender."

"She was tender hearted?"

"Of course she was, but not soft like some. She was always bright and cheery, and had a laugh or a joke or a pleasant word for every one. She used to come whisking in every morning, and trip through the place, saying good-morning to every one by name. She always came bustling into my office as breezy and chipper as a young girl. It was always "Good-morning to you, Sheriff; are you good-natured to-day?" You could'n't help warming up to her. Another woman might have seemed bold and forward, but she didn't. Every morning

it was just the same. 'I've got some people to see,' she would say. 'Can I go into the cells?' she'd always ask. She could have gone right in, coming for twelve years that way, and everybody knowing her, but she always asked, and when I said, 'Why, of course you can,' she'd say, 'Thank you kindly, Sheriff; thank you kindly.'

The big fellow's face flushed up as he spoke of her, and his blue eyes were warm and moist.

A quiet, unobtrusive little woman in the court-room—just and of good judgment. A breezy, joking, bustling spirit about the Tombs; full of cajolery and flattery for officials of a brief authority, open-handed, shrewd, and tender with the odds and ends of poverty, misfortune, worthlessness, and crime that gathered there. Was this conscious acting, and if so, for what ambition was the effort spent? Every morning, before going to the Tombs, Mrs. Foster went to Calvary Church, at the corner of Fourth Avenue and Twenty-first Street. I called there several times to discover why. One afternoon I found the sexton in. He had served in that capacity for a number of years, and had known Mrs. Foster well.

The vestibule of Calvary Church is long and wide. Its low ceiling and narrow windows of stained glass give it a resemblance to an ancient castle hall. It is a dimly lighted, cool, and somber place, where people tread softly and seldom speak aloud.

"It is empty now," said the sexton glancing down its length, "but when Mrs. Foster was alive, there was most always someone here waiting in the hope of her dropping in. There were twenty or thirty of 'em here in the morning about her time to come. She used this as her uptown office, and she kept the clothes and things she gave away in the basement. She was always collecting every kind of thing and sending it here. Sometimes a wagon would drive up and unload."

"How old was she?"

"Well, to look at her, you would say she was no more than thirty-eight or nine, but she must have been over fifty."

"Was she attractive? How did she look or dress?"

"She had handsome eyes, kind of dancing and thoughtful too. She always dressed well, in black, and her clothes fitted. She had a trim good figure, and ways like a girl—light on her feet, quick and graceful. It was a wonder to me she could go about at all times of night and in all kinds of places alone and never have harm come of her. She

would go anywhere and do anything without thinking. One time she had been to a dinner at some fine place or other and got back to the hotel late. An old woman was waiting for her, and told her about a daughter that had got astray and was leading a bad life in a low resort on the Bowery. She had been gone from home a little over a week, and they had just found out where she was, but the dive-keeper had hid her away and the mother couldn't get to her. Well, Mrs. Foster got a cab and drove, just as she was, evening dress and all, right to the door of the dive.

"She went in alone, and as she walked among the tables where men were drinking they called out to her all kind of things. She went right to the bar and asked the keeper for the girl she was after. He swore at her and ordered her to get out. Then one of the men at a table jumped up and called out, 'Speak civil to her, Patey. Shut up, you fellows! That's the Tombs Angel your talking to. That's who she is.'

"As soon as they heard that, a lot of the men came up, and the girls crowded around her, and they made Patey go and get the one she'd come for."

Mrs. Foster was married in Calvary Church, in 1865, to the brilliant Judge Advocate who later tried those accused in the conspiracy to kill Lincoln. The President was not at the wedding because the stress of the times would not permit, but it is the impression of one of Mrs. Foster's daughters that one or more members of the Cabinet attended. However that may be, it was a great social event, and the merry, tender-hearted, joy-loving young girl who was the center of it became the Tombs Angel, and for twelve years after her husband's death used the place of her wedding as a reception-hall for her friends the outcasts. It has been impossible for me to get from anyone a statement as to her motives. No one seems to know just why she became a servant of the court and of the condemned. She was not a grief-stricken woman, seeking to hide her life and forget herself and her sorrows in such service; she was not an organizer of societies, nor a reformer, nor one who loved to be busy about other people's business. She loved society, and was a bright and active member of a wealthy and cultured circle, during all the years of her toil in the slums.

"I don't know that I can give you any reason for it," said her daughter, "except that she loved such work, and that, as the years

passed, it gradually grew of itself and absorbed her."

"Did it make her unhappy?"

"She was the merriest one of the family. She seemed younger than her daughters."

"Did she talk to you about her work, about the people she helped?"

"Only when she was sick and needed *our* help. Then she would tell us whom to go to and what to do for them. That was all."

These details do not lend themselves to the portrait of a conventional missionary, and it is to be hoped that the artist who designs the monument to be placed in her memory will avoid ancient and accepted symbols—for here is something striking, significant, and new."



Judicial Insolence.

THE following account of a scene in a London Court, illustrates the difference between the prevailing ideas of practical courtesy on the two sides of the sea. If this scene had happened in an American Court the Judge, instead of getting an apology would have been in danger of getting his head broken. The Solicitors Journal says:

During the hearing of judgment summonses before his honor Judge Shortt, K., a solicitor, a stranger to the court, rose, ungowned, and said that he was for the plaintiff in the case under consideration.

For a few moments the judge gazed at him in silence, and then inquired, "Who and what are you?"

"I am a solicitor, sir," replied the lawyer in a tone of surprise.

"Oh, next case; this is struck out," remarked the judge.

For a few seconds the solicitor stood stupefied, and then ejaculated, "What is that for?"

"Don't interrupt the business of the court," said his honor.

It being privately explained to the solicitor that his honor made it a practice never to hear counsel or solicitors unless they were fully gowned, he exclaimed, "It is very hard."

"What is that you say?" Demanded the judge; "you had better be very careful; I can send you to prison."

The solicitor rose and walked out of court, saying in an audible "aside" as he went, "I should like to see you do it."

The judge, with outstretched hand, called out, "Usher arrest that man."

Immediately two officers sprang forward to do his bidding, and in a few moments the solicitor, who had by this time left the court, was brought back.

"Don't hurt him, but take him to some room where he can think it over," said the judge.

As the officers were removing the solicitor to another part of the building, he exclaimed; "I am a good subject and a solicitor. I did not know the practice of this court."

"What is that?" demanded the judge.

"I did not know the practice of this court," faltered the solicitor.

"It is very easy to learn, and you should have done so," retorted the judge, adding impressively: "As long as I am here everyone shall keep order, from the highest counsel to the lowest litigant."

"I am very sorry," said the lawyer.

"Don't appear to be very sincere in your apologies; perhaps you had better be kept in custody a little longer," retorted the judge.

"I offer you my sincere apologies, then, your honor," said the solicitor after some hesitation.

"Humph! You had better repeat that," said Judge Shortt. The unfortunate lawyer did so, whereupon his honor remarked: "You can now quietly leave the court."

The solicitor walked out, declining to furnish his name to the reporters.—



Mr. Dallas said in one of his speeches, "Now we are advancing from the starlight of circumstantial evidence to the daylight of discovery; the sun of certainty has melted the darkness." To which Curran retorted, "When man cannot talk sense, he talks metaphor."

Should a College Degree be Required for Admission to Law Schools?

DURING the last three or four years at meetings of Bar Associations and Legal Educators throughout the country, the question, what amount of preliminary training should a student have before entering upon the study of the law? has given rise to much discussion. Probably more than seventy-five per cent. of those admitted to the Bar at present are graduates of law schools or men who have studied for some time at a law school. The standard of preliminary examination before county and state boards throughout the country is in most cases considerably lower than that required for graduation from the average high school, and in many localities amounts to little more than a grammar school examination. In the law schools in the United States, of which there are now over one hundred, the requirements for admission vary from a common school education to a college degree.

Each year this subject gives rise to numerous articles, papers, and discussions as to what standard would be the most fair to all desiring to enter one of the large law schools. No satisfactory solution of the problem has yet been reached, and the differences of opinion are perhaps as great as ever. Some advocate the requiring of college degrees, many think the training necessary to pass the average college entrance examinations sufficient, while others would have each applicant take a special course of a few years in college, and still others think a common school education sufficient.

Some interesting statistics have just been prepared by the Registrar of the Law Department of the University of Pennsylvania which would seem to throw considerable light on the subject of what standard of admission would be the fairest to all applicants and which would do the least injustice to persons desirous of pursuing their legal studies at one of the large university law schools. Among those studying law at Pennsylvania every kind of preliminary training of the higher standard is well represented; no one, however, being admitted unless he shows evidence of having done a sufficient amount of

preliminary study to enable him at least to graduate from a high school of good standing.

For the purpose of ascertaining the capacity of various classes of men, the Registrar takes the total number of students and separates them into six scholastic divisions, as follows: 1, those who entered the school on college diplomas from Harvard, Yale, Princeton and Pennsylvania; 2, those who graduate from the Central High School of Philadelphia; 3, all college graduates; 4, all men who had spent some time at college, but failed to graduate; 5, all graduates of public high schools; 6, "all others." In the latter he includes all those who were obliged to take the college entrance examinations, most of them coming from private preparatory schools, no certificates whatever of such schools being accepted. According to his record 43 per cent. of the 365 students in the department last year were college graduates, 18 per cent. partial college men, 28 per cent. high school graduates and 10 per cent. of "all others." In these, 115 institutions were represented, of which 58 were colleges or universities. With these scholastic divisions in mind, he works out the following statistics, which furnish much food for thought.

The marking of examination papers at Pennsylvania is on the scale of 100, from 90 to 100 being considered as Distinguished or "D;" 65 to 89 Passed or "T;" 64 and below, Conditioned or "C." On this scale the general average made by the students in the entire department was 75.05, of which 18 per cent. represent "D," 66 per cent. "P" and 14 per cent. "C." Only the college graduates and the partial college men, as classes, attained the general average of the department.

The percentage of men who passed with conditions is lowest with the college graduates, where it is 13, and it gradually increases until it reaches the "All others" and public high school graduates where it is 25 per cent. respectively. The percentage of men dropped on account of three or more conditions also demonstrates the advantage college men have over others, only nine and seven per cent. respectively, having been dropped from among the college graduates and partial college men, as compared with 13 per cent. and 20 per cent. respectively, from the public high school graduates and "All others."

Horse Trade Puzzles Court.

JUDGE PARKER of the second District Court of New Jersey is looking up David Harum for guidance in a question of "hoss and hoss" brought to his attention by Joseph Bienstock, a grocer, and Giuseppe Tennerelli, a junkman. Bienstock owned a bony horse that was not as likely an animal as the junkman's. Tennerelli thought his horse was worth \$240, and he agreed to take the grocer's nag with the understanding that he was at liberty to sell it and have Bienstock pay him the difference on the price obtained from the sale. Bienstock agreed to the proposition and the horses were transferred.

Matters stood thus for several days, when one morning Bienstock entered his stable and found the junkman's horse dead. He concluded that as Tennerelli had not yet sold his horse the deal was off, and went to the junkman's stable to argue things over. Tennerelli was not there, but the horse was, and Bienstock took it back to his stable. When Tennerelli found the horse missing he went to Bienstock's stable to convince him that he had made a mistake. Bienstock was not at the stable, but the horse was, and the junkman took it back to his own stable.

Bienstock then decided to go to law. He retained Lawyer Cicarella. Replevin suit was brought, and when Tennerelli was served with the papers he retained Counsellor Lichenstein.

The relative claims to ownership of the living horse were discussed before Judge Parker, but the testimony of both sides was so contradictory that decision was reserved.

"I'm not a horse dealer," said Judge Parker, "and will have to take time before adjudicating this matter. The statutes on horse swapping are not clear and, so far as I know, there are no precedents to go by. The case is unique in my experience."



"Pray, my lord," said a fashionable lady of Lord Kenyon, "what do you think my son had better do in order to succeed in the law?" "Let him spend all his money; marry a rich wife and spend all of hers; and when he hasn't a shilling in the world, let him attack the law." was the advice of the old Chief Justice.

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1902.**

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UPON one occasion the late J. B. Ryan, of Pottsville, Pa., one of the most fearless as well as one of the ablest lawyers in Central Pennsylvania, was arguing an important case before the Supreme Court of the State and in the course of his argument, something was said about the large number of decisions from the lower court that were affirmed by the higher tribunal.

"Why, Mr. Ryan," said one of the Justices, "don't you know that four-fifths of all the decisions that come before this Court for review are affirmed by us."

"Yes, your honor," replied Mr. Ryan, "I knew that, and when you get to affirming the other fifth, we'll abolish the Court."

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DECEMBER, 1902.

THE 

BAR

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DECEMBER, 1902.

NO. 12.

THE BAR

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An Open Forum.

This journal is intended to furnish an open forum to every lawyer for the discussion of any policy or proposition of interest to the Profession. It invites a free interchange of views upon all such topics whether they agree with the views of THE BAR or not.

THE BAR goes to every Court House in the State and is read by, probably, three-fourths of the lawyers of the State, and thus furnishes not only a ready medium of communication between members of the Profession, but of unification of the Profession on all matters of common concern, which is its prime mission.

Every clerk of a circuit court is the authorized agent of THE BAR in his county, and has the subscription bills in his possession, and will receive and receipt for all money due on that account, or for new subscriptions, and his receipt will always be a good acquittance for money due THE BAR.

THE BAR is furnished at the nominal rate of \$1.00 a year, which is less than the cost of publication, and we would like to have the name of every lawyer in the State on our subscription list.

OVER in Virginia they are wrestling with a 60 year old suit, that has outlived many distinguished members of that bar. There ought to be an age limit at which a suit would be old enough to walk out of court of its own motion.



MR. Macatee, of the Fairmont bar, contributes a well considered paper in this issue on a very pertinent subject.

For want of space we have divided it into two parts, and will give his conclusions on another branch of the subject in our next number.



THE technicalities of the law are never more eagerly invoked than when Judges are dealing with wills. In a recent Georgia case a testator had written on the margin of his will: "This my last will and testament is of no avail and null and void." But the court said it was not revoked. In a New York case the testator had drawn lines with a pen across the pages of a will. The court said it was revoked. But an expert was called who testified that the erasing lines were *not in the handwriting of the testator.*



PROBABLY some American aspirants for admission to the bar think it is an expensive proceeding. For their consolation the following summary of the preliminary fees for admission in old England are here partly summarized. The necessary expense preliminary to being called to the Bar varies slightly according to the selection, but the average amounts payable are as follows: Admission form £1 rs.; fees on admission as student (including stamp), £40; lecture fees on admission, £5 5s; cash deposit, £100; fees on call to the Bar (including stamp), £94. When the student has been called to the Bar his robes—that is to say, the wig, gown, and bands which are required in Court, with the bag and tin box required for holding them—will cost from £8 8s. to £10 10s., and a

fee to the counsel with whom he reads as a pupil will cost him £105 per annum.



IT is evident that the Wheeling bar was looking for a good, big, generous job when they undertook to entertain the State Association at its next meeting. We'll all be there; and we wont go home till morning.



THE miner drills the hole in the coal seam, inserts the powder, and fires the blast, which knocks down the coal. He then rests while his helper loads the coal into the cart. In four to six hours each day he brings down all the coal his helper can pick up in eight or ten hours. It is stated that he could keep two laborers going constantly if he was willing to do the work, but the union objects to this. The usual day's work is six cars, and the miner is paid by the car, averaging about \$1 a car. Out of his \$6 a day gross earnings he pays his helper \$2, and pays for his powder, fuse, wicks, etc. His net profits range from \$60 to \$100 a month, which he would double if he was willing to keep two laborers busy. The laborers receive \$2 a day. In order to become a licensed miner a laborer has to work two years in the mines and pass an examination.



SOME criticism was made on a recent decision by our Court of appeals, declaring it fatal error in a criminal trial because a question was asked a witness during the absence of the accused who had stepped out for a moment—the question being repeated again on his return. The supreme court of Georgia has quite as emphatically affirmed the right of an accused to be present at all stages of his trial. It appeared that some time after the jury had retired to deliberate upon their verdict, they were recalled and given a second charge in the absence of the accused and his counsel. It also appeared that this charge was the same in substance as that which had been

delivered in the first instance, but this fact would not excuse the omission to have the defendant present in court. After condemning the practice and carefully reviewing the case, the court said :

"The great point is that the accused and his counsel have the right to be present at every stage of the proceedings, and personally see and know what is being done in the case. To say that no injury results when it appears that what occurred in their absence was regular and legal would, in effect, practically do away with this great and important right, one element of which is to see to it that what does take place is in accord with good law and good practice."



SATISFACTORY results are beginning to be felt from the earnest fight being made in the interest of better legal education.

The great increase in the number of students in the law schools of the country, and in the schools themselves within the past few years is alone sufficient to enlist the best thought and efforts of the profession in securing and maintaining a satisfactory standard of legal education.

From the following table a comparative study of the schools can be made :

	1890.	1901.
Number of law schools in the United States.....	54	96.
Number of law students in law schools.....	4,518	12,468.
Schools with three year-courses.....	10	42
Schools with two-year courses.....	84	46
Schools with one-year courses.....	7	5
Schools with two and three-year courses.....	8	2
Schools with one and two-year courses.....	-	1



To Circuit Clerks.

THE BAR would like to publish in its next number, a complete roll of the circuit clerks, who will occupy those offices as a result of the last election.

It is an advantage to the bar of the state, as well as to

many other persons having business in the counties, to know who are the circuit clerks. This information is, generally, a long time coming out, and it will hasten the matter to publish it in this way.

We therefore ask the favor of each of the circuit clerks now in office that he will immediately drop us a postal giving the name of the circuit clerk elected in his county, for publication in our next issue.



Get Busy.

WE are moved to remind the several committees of the Bar Association, that now is a good time to get busy in preparing their reports for the approaching annual meeting.

The time draws near; and it is the reports and recommendations of the standing committees that make the meetings of practical effect: that make the Association of some practical value to the Profession; that give it an excuse for its existence that enable the bar of the State to carry from year to year its plans and purposes to a consummation. Without the standing committees the Association would lapse into "innocuous desuetude."

A large body which meets but once a year and remains in session but a part of two days cannot expect to accomplish anything unless its work is formulated and matured in advance.



Queer Status of the Porto Ricans.

JUDGE LACOMBE, of the United States Civil Court, has decided that a citizen of Porto Rico is not a citizen of the United States, and cannot land here without interference from the immigration authorities, but notwithstanding the insular decision, is an alien within the meaning of the law. This is the famous case of Isabella, who arrived here last August and who was detained by the immigration authorities on the

ground of being an unmarried woman. Her condition was such that she was an undesirable alien. She was ordered to be deported, but a well-to-do aunt and uncle residing on Staten Island secured attorneys to get her released through habeas corpus. The judge decides on the ground that the fourteenth amendment to the constitution provides that only those persons born or naturalized in the United States and subject to jurisdiction thereof are citizens of the United States, and that the Treaty of Paris instead of making native-born citizens of Porto Rico citizens of the United States, expressly provides that the civil rights and political status of the native inhabitants of the territories ceded to the United States shall be determined by Congress, and that this has not been done. It would appear then that so far as citizenship is concerned the Porto Rican is "a man without a country."



Congratulations.

THE voters of the state have done their plain duty in regard to the proposed amendments to the State Constitution.

We believe every one of the amendments was adopted without much opposition, though the reports on the result have been very meager. The politicians have been so very busy and eager in tabulating and ascertaining the result of the vote on members of the legislature and Congress, that the principal feature of the vote has been ignored. May be after a while some one will recall that there was a vote taken on several important amendments to our organic law, and we will learn the exact result of that vote.

It remains now to readjust the governmental machinery to this new order of things. We will have an additional member of the Supreme Bench, appointed by the Governor, until the next general election. The salaries of the Judges will be fixed by the next legislature, and we hope they will be made

respectable enough to secure respectable representatives on the bench for all future time.

Some other salaries too, will be fixed by the legislature in lieu of a system of fees as heretofore.

We will quit hoarding money for the support of the public schools, and pay as we go.

Some other things we will do that we have not been doing before—and do them in a much more sensible way than we have been.

Altogether we are much pleased. We reach over with our right hand for our left and congratulate ourself that the “Sun do move.”



A Valuable Report.

THE State Tax Commission has made a very elaborate and interesting report that may well occupy the attention of the next session of the legislature to the exclusion of every thing else.

This is a subject of far reaching importance to the State. The time has come in our history when we ought to put in operation a system of taxation that is comprehensive, systematic, and above all, that distributes the burden equitably and uniformly among the proper subjects of taxation. Our existing system is a source of corruption and scandal. The first and fundamental principle of any system of taxation—that it should be equal and uniform—is defeated by its very looseness and crudeness.

Under any system which allows one class of property or tax debtors to escape their obligations; or rather, which gives them the easy option of paying or not as they may elect, the burden of the honest tax payer is thereby inevitably increased, and a premium is put upon evasion of the law.

Without going into a review of the system or measure proposed by the commission, we wish to commend the single

feature at least which provides for enforcing the law which the legislature may adopt for revenge purposes. The very best tax system in the world, or the very best system of laws for any other object, would prove nugatory if left to the option of those upon whom they were imposed to obey them or not.

We believe this commission has performed a valuable work for the state. There is a great fund of information contained in their report, and the obligation is upon each member of the legislature to give it careful consideration, and upon the whole body to give ample time to the enactment of a complete system that will enhance the prosperity and development of the state beyond any possible advancement under the present system.



Another Veteran Passes Over.

THE death of Judge R. L. Berkshire, still further reduces the depleted ranks of that class of veterans who were active at the bar when this State was sundered from Virginia.

He was a member of the first Supreme Court of Appeals that was organized in the New State. He has been active in practice ever since until within a very short time before his death.

He was a typical representative of that class of old time lawyers whose characteristics were in marked contrast with the present generation, yet are difficult to describe so as to portray a faithful picture to those to whom they were not personally known. They did not come from the law school as the existing generation of lawyers have. They were self-made, and somewhat lacking in general culture, but keen, resourceful, and worthy foes of the most accomplished representatives of the Profession.

There is much that might be written of Judge Berkshire's life and the class to which he belonged, that would be worth

while as a review of a type of lawyers which will soon be only a memory, and which we all regret to see passing away. But we forego the attempt, hoping that his memory will find fitting tribute in the proceedings of the Bar Association. His local bar paid him high honor, and his death brought many expressions of respect from a wide acquaintance throughout the State.



Object Lessons.

THE Mollineux trial is over, it is said, and ought to be dropped, and relegated to the past.

It is true that so far as Mollineux is concerned the result is fixed and final and ought to be dropped. But we very much mistake if the influence of that trial on public sentiment will soon pass away. We very much mistake if its effect in bringing our criminal jurisprudence into disrepute with the public has ever had a parallel in any other case. The case has presented some object lessons in our criminal procedure that furnish food for serious consideration.

Here was a young man of good character, of good standing, of good family, a good citizen, who was arrested on a charge of murder. The evidence could hardly be said to be circumstantial. Nobody saw him commit the murder. Nobody saw him do anything that would even remotely connect him with the murder. He was gathered in by the police on the sole assumption that he had a motive. He happened to know the victim, and sometime previous, had a dispute with him upon which the presumption of unfriendly relations was based.

Upon this single assumption a case was attempted to be built up; he was arraigned for trial; a brigand of a prosecuting attorney was allowed to cavort around a criminal court for two months in an indecent fashion in the effort to convict him; he was convicted; he was sentenced to death; he spent four years in a felon's cell; the State expended nearly a quarter million dollars at the beck of this prosecutor; the old father of

the accused spent his fortune, amounting, it is said to \$200,000 to defend him, having suffered this; a second trial lasting a month was obtained, and in thirteen minutes after the jury retired they reached a verdict of not guilty.

The plain recital of these facts is sufficient to raise the inquiry in the public mind, as it has, whether there is not something radically wrong with our criminal jurisprudence.

Does that kind of an experience hang over the head of every citizen as a possible or probable fate, and is there no escape from it?

We say, yes, necessarily, so long as a state will put into the office of Prosecuting Attorney a desperado, a professional bandit like that which conducted the prosecution of Mollineux in the great city of New York.

A prosecutor who has no conception of his office, who is incapable of appreciating that the prime end of all government is justice; that as the representative of the State his duty to protect the innocent is as imperative as to punish the guilty; and who prostitutes his high office to his first and only ambition of advertising his professional skill and seeking to augment his own consequence even at the cost of the life and liberty of a fellow man—this is the kind of thing that is set up to represent the sovereign State in our courts, and the kind of thing that hangs a merciless menace over the head of every citizen.



The Eighteenth Annual Meeting.

THE Eighteenth Annual meeting of the West Virginia Bar Association at Wheeling, December 30th and 31st prox. bids fair to be one of the most entertaining and largely attended in its history.

In the first place the bar of the State has unlimited confidence in the unlimited ability of the local bar of Wheeling to make the occasion one which every body will be sorry to have missed. The Wheeling bar is composed of men, big hearted

and generous, who have the facilities as well as the talent for entertaining, and who will go their whole length in making the occasion one of both professional and social enjoyment and profit, as their past history as hosts amply illustrates.

In the second place the dates of the coming meeting are favorable to a large attendance. There will not be a court in the State in session. It offers opportunity for all the judges of the State to be present, and it is confidently expected that they will. Heretofore only those members of the bar who reside in the section of the State nearest the place of meeting could be expected. But the dates this year are in the holiday time when every body is off duty, and everybody is inclined to take an outing, and it is expected that there will be an influx of members from every section of the State. It is hoped, too, that many who are not members will be present and that there will be a large accession to the roll of the Association.

The program will be an interesting one, dealing with pertinent and practical matters in which every lawyer will be interested. One subject, especially, will interest every lawyer who desires to see the courts of the State manned by able and honorable men—and that is the fixing of the salaries of judges. The influence of the Association will be very powerful, if properly brought to bear, in making these salaries such as will draw the best talent of the bar to these responsible positions. West Virginia has gained memorable notoriety for bringing up the rear in the matter of judicial salaries. Let us go up to the top. It will pay. There is no economy in depreciating and degrading the bench by doling out a mere living for the highest and most responsible officers in the state. The Bar Association ought to make itself heard and felt at the coming meeting on this subject.

The Association is certain to have two fine addresses—the one by the President, Hon. George E. Price, of the Charleston Bar, and the Annual Address, by Hugh L. Bond of Baltimore. Beside these the topics of the several papers are all of unusual interest.

Special rates, as usual, will be allowed by all the railroads, and many things not down on the program will be among the chief events of the meeting. But here is the Program as already formulated:

PROGRAM

ON THE EIGHTEENTH ANNUAL MEETING OF THE WEST VIRGINIA STATE BAR ASSOCIATION.

To be Held at Wheeling on the Thirty and Thirty-first Days of December, Nineteen Hundred and Two.

FIRST DAY—DECEMBER 30TH, 1902—2 P. M.

1. Annual Address by the President.....Hon. Geo. E. Price, of Charleston.
2. Report of Committee on Admission, and Election of Members.
3. Report of Secretary.
4. Report of Treasurer.
5. Report of Standing Committees as follows:
 Executive Council,
 On Judicial Administration and Legal Reform.
 On Grievances,
 On Legal Biography.
6. Paper by Edgar B. Stewart, of Morgantown,
 SUBJECT—"The Torrens System; a Practical Bill for West Virginia
 and the Reasons."
7. 3 P. M.—Annual Address.....Hugh L. Bond, of Baltimore, Md.
 Subject to be Announced Later.

SECOND DAY—DECEMBER 31ST, 1902—10 A. M.

1. Paper by Hon. A. G. Dayton, of Philippi.
 SUBJECT—"House Bill 8316, Congress U. S."—(Being the Bill Re-
 forming and Codifying the Acts in Relation to Civil Proce-
 dure and the Jurisdiction of the Federal Courts.)
 2. Papers by John J. Coniff, of Wheeling and O. W. Dillon, of Fayetteville,
 SUBJECT—"Injunctions—What Legislation, if Any, Should be had
 in Relation to them."
 3. Nomination of Officers.
 4. Appointment of Standing Committees.
 5. Miscellaneous Business.
 6. Election of Officers.
 7. Appointment of Delegates to American Bar Association.
- 8:00 P. M.—Banquet.

TOPICS FOR GENERAL CONSIDERATION AND DISCUSSION.

[Any of these topics may be taken up for consideration on motion of a member, at the Pleasure of the Association.]

1. Report of State Tax Commission.
2. What Salaries Should the Supreme and Circuit Judges, Respectively, Receive Under the Constitution as Amended?

3. Will the Association Formally Endorse the Inauguration of the Torrens System in West Virginia? If so, how?
4. Is it Desirable that an Attorney Should be Admitted to Practice Regularly in the Courts of this State on the License Obtained from Another State?
5. Is it Expedient for this Association to Attempt the Codification of a complete System of Criminal Practice and Procedure for Recommendation to the Legislature?
6. A Majority verdict in Civil Cases.
7. What Legislation will the Association Propose to the Next Session of the Legislature?



VALUE OF TRAINED EARS.

Court Stenographers Good Judges of Veracity of Witnesses.

ANY shorthand man who has been doing court reporting for a long time can tell almost infallibly by his sense of hearing whether a prisoner or a witness is telling the truth or lying," said a Washington court stenographer, according to the *Washington Post*, who has grown gray in making and transcribing pothooks in civil and criminal cases." It comes from experience, combined with the abnormal development of hearing, which all first-rate court and parliamentary stenographers possess.

'You know how abnormally the remaining senses of blind folks are developed, particularly their sense of hearing. Well, it's the same way with the court shorthand man after he's hammered away at that sort of work for a good many years. His ears become as sensitive to the slightest inflections and intonations of human voice as a phonograph roller. There's a certain tremulous quaver in the tone of a man or woman who's lying in a court room that the stenographer catches when the shrewdest judges, lawyers or jurors quite fail to catch it. When he has his head bent over his note book he feels the jarring false note in the voice of the liar every time, no matter how plausible or convincing the testimony in itself may sound. So frequently have I tested this idea in the last fifteen years that I have come to accept it as certain, when that almost indistinguishable false tremolo is absent from the tone of a prisoner's or a witnesses' voice, that the testimony is true.

"A few years ago before I left Chicago for Washington, I reported

the trial of a young chap who was accused of having sandbagged a south side jeweler in his store and looting the establishment. The young fellow was good looking and intelligent, with a face as frank as an eight-day clock, and an easy, candid, winning manner. I looked him over before the trial began, and I decided that the accusation against him was outrageous. When witnesses testified that they'd seen him coming out of the robbed jewelry store I strained my ears to catch the false intonation in their voices, but it wasn't there. When the defense opened the young man was permitted to go on the stand in his own behalf.

"I was stupefied to find that his voice had the lying quavor in it right from the beginning of his story. His words vastly impressed the jury and as vastly chagrined the prosecution. But I knew that he was lying, nevertheless. He undertook to prove an alibi. In corroboration his married sister testified that her brother had been at her apartment from 3 o'clock in the afternoon until 10 o'clock at night on the day of the crime, taking dinner with her and keeping her company in the absence of her husband. Well, she was lying, too. She had that tell-tale false ring in her voice that convinced me of this, despite her fine, frank face and her obvious respectability.

"The court adjourned for luncheon at the conclusion of her testimony. I took luncheon with the attorney for the prosecution.

"Well, what do you think of this case?" he asked me when we sat down. "I guess we don't land him, eh?"

"He's guilty, I replied briefly. 'He was lying and so was his sister.'

"The attorney for the prosecution looked me over out of the slits of his eyes, but I didn't say any more. When the court reconvened he asked for an adjournment until the next day, and the judge granted it. On the following morning the prosecuting attorney had in court the janitor of the apartment house in which the prisoner's sister lived. The janitor testified that the prisoner's sister had not been in her apartment from noon until late at night on the day of the robbery.

"The janitor was still on the stand when a detective walked into the court room with the loot from the jewelry shop. He had found it in a search of the prisoner's sister's apartment that morning. That settled the case, of course. The prisoner's sister broke down, and confessed that she had been endeavoring to shield her brother. who got ten years for assault with intent to kill and robbery."

An Interesting Case in Which the Attorney Cries for Help.

THE BAR:—

THE astonishing proposition is announced by a Circuit Court, that no relief can be granted by our Court of equity against an erroneous and prejudicial judgment rendered against an infant by a justice of the peace, if the infant has allowed 90 days to elapse since the judgment was rendered. The amount be but \$99.00 and therefore not appealable, it is of importance that some way to relief be found, or else any infant's property may be taken by any designing trickster through legal process before a justice in the same manner as is shown by this case.

As there is no other appeal except by "airing" the case in the Bar, we appeal to your forum.

A sold an eighteen year old boy an article that was hurtful to the infant, rather than a necessity. The boy paid part in cash, and gave his note for balance. The note not being paid, A sues on it before a justice, got judgment by default against the infant, without the appointment of a guardian ad litem, waited till 90 days had elapsed, then levied on all infant's property, including the article sold him, as well as some valuable household articles bequeathed him by an aunt.

The infant's mother hearing of it, filed a bill of equity as the infant's next friend to enjoin the sale, and prayed that the judgment of the justice be set aside and annulled and that her son and the plaintiff be placed in statu quo,—the boy returning the article bought, and the plaintiff to return the money he had been paid by the boy, and the other articles levied on.

The Court granted the injunction and then desolved it on motion, giving as reason for doing so:

1. That though the judgment was erroneous and though it was not void, (so that the execution could not be quashed on motion or attacked in any way except by a direct proceeding, which is correct law, 9 Am. & Eng. Exc.—(1st Ed.) 158; McDonald vs. McDónald, 3 W. Va., 676; Myers vs. Myers, 6 W. Va., 369.) Yet

(1) That the infant's proper remedy had been by an appeal within the 90 days and inasmuch as the infant, or his next friend had not done so, he was remediless:

(2) That while the Circuit Court on its equity side has power to en

join proceedings under said to annul and set aside judgment against an infant rendered by the Circuit Court on its law side, and to annul and set it aside at anytime when the infant by his next friend asks such relief at any time before infant arrives at age of 21 years and 6 months, (as was emphatically announced in *Lafferty vs. Lafferty*, 42 W. Va. 785) yet the Circuit Court cannot exercise the same jurisdiction over a judgment of a justice against an infant.)

For this proposition the Court had no authority or disclosed none, and the writer knows of none.

The Court so decided despite the following propositions and authorities:

1. Statute gives infant right "to show cause against a decree of order within six months after attaining the age of 21 years. Code page 888.

2. Petition by infant is frequently used in Circuit Court, as in *Hull vs. Hull*, 26 W. Va., 1. Petition in Justice's Court will certainly not lie, as justice has absolutely no jurisdiction to perform any judicial act after his judgment has been rendered, except to grant appeal in ten days or grant new trial in two weeks, *Maclain vs. Davis*, 37 W. Va., 332-3.

3. *Coram nobis* will not lie as justice's Court is not a Court of record, and justice has no jurisdiction except such as is given by statute. *Maclain vs. Davis*, 37 W. Va., 330 and *Hickman vs. R. B. Co.*, 30 W. Va., 310.

4. It is familiar equitable principle that Courts of Chancery act as *parens patriae*.

5. And an equally familiar equitable principle that "Where there is no edequate and complete legal remedy, * * * it is equally difficult to conceive any satisfactory reason for withholding relief by injunction, since injury resulting from void judgment would be irreparable. *R. B. Co. vs. Ryan*, 31 W. Va., 367. "If without his fault, defendant has lost his legal remedy, equity may relieve him by injunction." *Hudson vs. Kline*, 9 Grat. 379.

6. Laches or neglect is not imputable to infant. *Hogg, Ex. Pr.* 340.

7. The infant may bring suit by his next friend during his minority to set aside a decree and have any proper relief his case may authorize. But an infant is as much bound by a decree against him

as an adult, and he not permitted to impeach it except for fraud collusion or error. But it is clear, also, that an infant until six months after majority may set aside a decree prejudicial to him for mere error.' Hogg's Eq. Pr. 230. "Where an improper decree has been made against an infant without actual fraud, it ought to be impeached by an original bill." Metford's Pl. 143. 1 Dan. Ch. Pr. practically uses same words. In Lafferty vs. Lafferty, 42, W Va., 785, Judge Brannon says, "An infant is as much bound by a decree as an adult. The infant if his cause against decree be error or law, may proceed by bill of review or supplemental bill in the nature of a bill of review, showing error of law, and in such bill I do not think that the infant would be confined merely to such matters to show error as appeared on face of decree, as in ordinary cases. He may proceed not only for fraud but for error in law. He may proceed by petition which is another name for bill. He may introduce new matter against the decree, so that it existed at the date of the decree. He is given the broad right to show cause against it, and under any of these pleadings he is given relief co-extensive with the right." On page 786, Judge Brannon also says, "While on the subject, I may say that an infant within six months after his majority, may file an answer making new defenses not before in and then reopen the case. He surely can introduce new defenses, and it is immaterial, practically, how he does so."

To same effect is Lamoreux vs. Crosby, 22 Am. Dec. 665, 2 page 422 and Lloyd vs. Malore, 74 Am. Dec. 179.

Joyce vs. McAvoy, 89, Am. Dec. 172, says pointedly that while erroneous and prejudicial judgment against infant is voidable, and can only be attacked in direct proceeding, an original bill lies as a direct attack.

As to the second proposition, that these principles apply to Circuit Courts setting aside a judgment of its own and not as a direct proceeding in review of a justice's judgment, it was submitted, that the above principles applied equally to Courts of equity's jurisdiction over any *proceeding*'—that it is not a question of jurisdiction over *justice*.

1 High Inj. P., 1, says—"And Courts have repeatedly held that judgments recovered before a justice of the peace may be enjoined when the judgment was void, and defendant has had no opportunity to defend,"—referring to cases in States where bill in equity is used as concurrent remedy with motion to quash execution.

In *R. B. Co., vs. Ryan*, 31 W. Va., 310 in *Howell vs. Thompson*, 34 W. Va., 798, in *Hall & Patton vs. Taylor*, 18 W. Va., 544, in *Shay vs. Noland*, 46 W. Va., 300, etc., original bill were brought in Circuit Court to set aside judgments rendered by justices, and not a question was raised in any of the cases, that a Court of Equity could not exercise jurisdiction over a justice's judgment, though in all the above cases, the bills were dismissed because the judgments were void or execution paid and the proper remedy was to move to quash the execution, or that (in *Shay vs. Noland*) the party should have appealed as he knew of the judgment in 90 days and was an adult. In all these West Virginia cases, the Court based its dismissal of the bills on the sole proposition that where the motion to quash execution was available, a party could not ask the intervention of a court of equity, with the plainest intimation that otherwise the Court of equity would grant the relief when there was a right and no legal remedy. It is but fair to add that the judge said he regarded this maxim as but a "loose expression to be found in some of the books."

We have been able to find no case where an erroneous prejudicial judgment rendered by a justice against an infant has been directly attacked by bill in equity but this is accounted for by lack of cases of such judgments large enough to reach an appellate Court.

Certainly if a Court of equity cannot review such a justice's judgment, any five year old infant may be sued before a justice, process served on him, judgment rendered, execution levied after 90 days has elapsed and the child's property taken, unless the child within the 90 days has the supernatural wisdom to:

1. Take summons to prominent lawyer and explain the case.
2. And has a next friend willing to give an appeal bond for \$600 (in case the judgment be over \$300).

If personal property can be sold under execution under such judgment, the child's realty can be subjected to its payment. If the judgment is not set aside by the time the child attains his majority and six months, the judgment is absolute.

The injunction has been desolved and the property sold, but the bill is still undismissed, and relief may yet be granted if some one can suggest a remedy to get back the money paid by the infant and the value of the infant's goods so wrested from him.

M.

The Passion For Lawmaking.

THE Virginia legislature, in solemn session assembled, is exercising its legislative talent over a statute to prevent kissing. The early passion of the pilgrim fathers for law making does not seem to have entirely spent itself in the blue laws of Connecticut.

In a recent New York case Judge Cullen took occasion to criticise the modern passion not only over legislation, but absurd legislation. The case involved the consideration of the statute to prevent spitting in public places. "The prevention" he said, "of spitting in public conveyances may be a desirable sanitary regulation, but the people generally do not yet account the dangers from bacteria and germs so momentous as to warrant the infliction of a year's imprisonment for this disgusting practice. The possibility of such a punishment seems monstrous, and so the provision remains largely a dead letter." "The people," as Burke said, "is the true legislator," and public opinion must approve a law to insure its enforcement. Two years ago, when president of the American Bar Association, Senator Manderson remarked—and the remark is true now as then: "The evil of over-legislation, of the passion for lawmaking, continues with unabated force, bringing in its train the ills of paternalism, dead-letter statutes, with disregard and even contempt of law." The ills thus broadly noticed may deserve a word of comment. Statutes allowed to remain to a great extent dead letters at present, because they crystallize, though with absurd extravagances, advanced though on certain subjects, may serve to direct attention to those subjects and be the cause of more intelligent observance of more enlightened laws at some future period. The tendency toward paternalism to which President Manderson called attention is a sign of the times, and we may see it in other things besides legislation. In the growth of trusts, in trade-unionism, the subordination of individual action to that of large bodies of

persons is evident. We still set before our eyes the ideal of freedom in its largest extent, and preach the vitality and happiness of a life controlled by free contract; and, while we are preaching, the principles on which society develops are decreasing the freedom of large classes, and our legislatures are extending State action and control over continually widening areas. A recent English writer remarks: "Every day the law is interfering more and more between man and man fixing, independently of individual wishes, the relations that are to subsist between them." Whether this is a tendency for good or no, we cannot afford to overlook it. It points apparently to ultimate socialism, while the universal acceptance of the broadest *laissez-faire* doctrine may lead to the realization of the dream which Prince Krapotkin, as the exponent of theoretical anarchy, sets before us.



WE have not been surprised to find judges continually adhering to the old precedents which give the right to a school teacher to flog some other man's child they—the judges—do not seem capable of looking beyond the precedents that were made under a different school system than that of the existing public school system, and observing that the old precedents are incongruous. But we are surprised to find so able a journal as the New York Law Journal, falling in with a recent decision supporting the right of a parent to delegate the whipping of a child founded on these antiquated cases. Both the law and the reason of the law being obsolete there ought to be a new deal on this topic that is consistent with good horse sense.



IT is interesting to note the views of the several legislators elect as to the most important subjects that ought to occupy the coming session of the Legislature. Evidently, the variety of view points will bring before the session all

the possible subjects that could occupy that body. As usual the road law is the most important in the minds of many members. And in this connection THE BAR desires to say that the next legislature has a chance to immortalize itself by simply repealing all the road laws save the alternate plan, and leaving that stand as the only uniform plan.



MR. Hugh L. Bond, of Baltimore, who delivers the annual address at the coming meeting of the State Bar Association, is the general attorney of the B & O Railroad Co. Like his predecessor, Mr. Cowan, he is a man of ability and culture, and we may expect to hear a practical address of exceptional interest and value. A mere theorist would not be the chief attorney of the B. & O. R. R. Co., and a mere theorist, however original, has never succeeded in interesting the W. Va. Bar Association.



IS the will of a *feme sole* revoked by marriage? seems to have become a legal puzzle. We discover that it is a very difficult, or otherwise unpleasant, conclusion for the average lawyer to accept, that under our modern statutes the *feme sole* stands on an equality with man, and the *feme covert* a step or two above him.



IF the members of the bar in each county will inquire of their respective members in the Legislature as to their notion of the appropriate salary for a judicial officer, they will, at least ascertain whether it was worth while amending the Constitution in this particular.



WM. F. HOWE, OLD-TIME LAWYER.

Reminiscences of the Man Who Once Dominated the Criminal Courts of New York.

WHEN William Frederick Howe died there passed away the last of a coterie of great criminal lawyers that made the bar of this city famous during the last half of the nineteenth century. For many years Mr. Howe, who founded the well-known firm of Howe & Hummel, was the peer, and in the opinion of many judges and lawyers the superior, of such great criminal lawyers as James T. Brady, Daniel Dougherty, John Graham, William A. Beach and many others. Mr. Howe was the only one of these great lawyers to survive the close of the nineteenth century, and during the last few years had practically retired from practice.

Each century brings, it has been said, a new type of man to almost every calling of life, to fit a new order of things and events. With the passing of William F. Howe so soon after the dawn of the new century there ceased to exist at the criminal bar of this city a lawyer of the old school. Even before his last few years at the bar, Mr. Howe saw gathered in the criminal courts of this city many young lawyers with new methods and new ideas. It is a matter for history to record whether the new school ever equaled the old one. It is safe to say that it will not be for many years, if ever, that the criminal bar will see the equal of him whom all called "Howe the lawyer." His school was the old school, and the old will ever, in the opinion of many persons be the best.

During nearly fifty years at the bar Mr. Howe helped the courts and the Legislature in making and building up the criminal law. It has been said that he received retainers in 1,000 homicide cases. The records of the office of Howe & Hummel show that he acted as counsel for 650 murderers. Almost from his introduction to the bar of this city in 1858, Mr. Howe, by his brilliant talents and profound legal learning, took a foremost place among the criminal lawyers. He was eloquent, humorous and pathetic, a powerful pleader. He was frequently moved to tears by his own eloquence and wept as he drew tears from the eyes of jurors.

Once, many years ago so runs one of the stories told of Weeping Bill as Howe was frequently called, an Assistant District Attorney,

while summing up to a jury, warned the men on it not to be swayed from their duty by Weeping Bill Howe's tears.

Mr. Howe, it is said, arose and exclaimed.

"A man who ridicules me for weeping at the sorrows of this prisoner—a man charged with the murder of a woman—whether the prisoner is guilty or innocent, is sure to come to a bad end."

Several years afterward Mr. Howe was reminded of the incident and was asked if his prediction had come true and if the Assistant District Attorney had come to a bad end.

"Alas, yes!" exclaimed Mr. Howe "a most fearfully bad end."

What was it?" eagerly exclaimed several of those who heard him and saw the ever ready tears appear in the lawyer's eyes.

"He—he—" said Mr. Howe, in a sad and hesitating tone of voice, "is now trying cases for a soulless railroad corporation—a sad, sad end to come to."

Mr. Howe was most successful in captivating jurors by his genial appearance and keen wit. He frequently held court and jury spell-bound by the beautiful creations and fancies of his fertile imagination. He frequently and most aptly quoted Shakespeare. Mr. Howe believed that, as the law presumed a man to be innocent until his guilt had been established, a lawyer was justified in using every lawful method to bring about his client's acquittal. Things done for effect on the jury often had an amusing and unexpected ending, as was instanced in the case of a man on trial for the murder of Commodore Voorhis, president of the Brooklyn Yacht Club.

Mr. Howe defended the prisoner successfully. His defence was that the man was insane and a victim of epilepsy. The prisoner sat in the court room with a bandage tied around his head and looked the picture of misery and insanity during all the days of the trial. When the verdict of acquittal was announced the prisoner, to Mr. Howe's disgust, jumped up and pulled the bandage off his head saying that he was all right.

Another story is told of Mr. Howe's tears while pleading for a client's life or liberty. At one session of the court, while Recorder Hackett was presiding, Mr. Howe had succeeded by his eloquence aided by his tears, in obtaining in rapid succession the acquittal of several men charged with homicide. The Recorder was somewhat disgruntled. During the trial of another homicide case the alleged wife of the pris-

oner sat with a baby on her lap. While Mr. Howe was pleading for his client's acquittal, he was seen to scowl at the mother. She gazed at him in blank amazement. Mr. Howe stopped and moved close up to the mother and the baby. Suddenly the baby began to cry. Mr. Howe also wept. The baby's cries almost immediately subsided, Recorder Hackett looked up with a smile and remarked:

"Mr. Howe you had better give the lady another jab with a pin."

In telling this story, as he frequently did, Mr. Howe said:

"That remark of the Recorder's about the jab of the pin won a hopeless case for me, for I used it against him for all it was worth."

Mr. Howe was always on the alert for some incident on which to turn a hopeless case in his favor. One of his most phenomenal victories, in his own opinion, was the case of Ella Nelson, a young girl charged with murder in the first degree. She shot the full contents of a six-barreled revolver into the body of the man whose mistress she had been and who tried to discard her. The girl was put on trial before the stoical Recorder Smyth. The then District Attorney refused to accept Mr. Howe's offer of a plea of murder in the second degree, which Ella was anxious to interpose.

The girl was put on trial for her life, and it was a trifling incident that enabled Mr. Howe to turn the tide in her favor. The cross-examination by the District Attorney disclosed the fact that in the pocket of the dead man was found a letter from another woman begging him to come and visit her and to continue their illicit relations.

This letter was couched in very amatory terms, and the prosecution tried, after bringing out the fact of the existence of the letter, which was news to Mr. Howe, to exclude it. Realizing the effect that he could produce with the letter, Mr. Howe insisted on its production before the jury. Recorder Smyth permitted Mr. Howe to read the letter to the jury. Word for word, in measured, solemn tones, the lawyer made every word of the letter tell with thrilling effect.

In talking of the case recently, Mr. Howe said: "You must see the strength of my position when I tell you that the District Attorney had prepared the jury to believe that the man whom Ella Nelson had shot had been weaned from his wife by the defendant, and had been, by her machinations and threats, prevented from returning to his family. Well do I remember rounding in its fullest meaning a sentence to the jury. 'This man died with a wilful lie in his mouth and

a written lie in his pocket.' "

In addressing the jury in the girl's behalf Mr. Howe did his usual dramatic by-play. The prisoner was seated with her head buried between her hands. Suddenly Mr. Howe turned around and without the slightest warning to her, made his dramatic by-play. He seized her wrists, quickly pulled her arms apart, distended so that the girl's tear-stained features were exposed, and exclaimed: 'Look in these features, proclaiming a broken heart!'

This picture of the frightened girl, her face an ashy hue, deluged with tears, was a climax the jury could not withstand, and they returned a verdict of acquittal.

Whenever he had an opportunity, Mr. Howe used children in court for the purpose of touching the hearts of jurors.

One of his greatest victories, the saving of Edward Unger from the hangman's noose, was largely through his use of a child.

Unger killed his lodger, a man named Boles, for the purpose of obtaining possession of Boles' bankbook. Unger murdered his lodger by smashing in his skull with a hammer. He then hid the body under his (Unger's) bed, in which bed his son slept that night. After the boy had left the house, Unger cut off the head from the body, took it to the East River and threw it off of a ferryboat. He then returned home, cut off the legs and arms, and sent them and the body of Boles to Baltimore in a box. Supt. Byrnes, on looking over the belongings of the murdered man, found a card bearing his name. He traced the man to Unger's home and induced Unger to make a confession. Supt. Byrnes said on the day Unger's trial began that Unger's grave was dug and his coffin made. It was not believed that Unger could possibly escape the gallows, but Mr. Howe made one of his extraordinary defences. He asserted that Boles had struck Unger first, and that Unger, seeing a hammer near at hand, seized it and, using it as a weapon of self-defence, resisted Boles' attack, and finally, in fear of his life, struck Boles and killed him. Mr. Howe, with much dramatic force, described Unger's remorse and told how Unger had hid the body under his bed for fear his son would see it.

"They slept over the dead body, it is true," exclaimed Mr. Howe, "but what a night it must have been for Unger!"

Then came Mr. Howe's most effective appeal to the jury. He exclaimed:

"Gentlemen of the jury, Edward Unger did not cut the dead man's head off. He did not mutilate the body. He did not throw the head from the ferryboat under the paddle wheels. He did not put the dilapidated and mangled trunk in a box and send it to Baltimore." Mr. Howe suddenly ceased talking. The jury and the spectators seemed paralyzed with amazement. Judge Barrett, who presided, seemed astonished, for Unger had previously on the witness stand admitted that he had done all the things that Mr. Howe had just asserted he had not done. After working the jurors up to this great state of excited expectancy, Mr. Howe turned his eyes fully upon Unger, who sat with his seven-year-old daughter on his knees. She was a pretty child, with golden hair and large blue eyes. She, with a happy smile on her face, ignorant of the dread ordeal, was engaged in playing with her father's gray hair.

Mr. Howe pointed at the child, and after a long pause exclaimed in a subdued tone:

"Look at that little girl. Oh! She cut off that head; she mutilated that body. It was not Unger. Yes! 'Twas she, 'twas she. Mr. Unger could not bear the thought of having it said, with that beautiful girl living, that he, her father, had committed so horrible a deed, and, therefore, when in a moment it occurred to him that he could hide the deed which had been perpetrated, he mutilated the body. It was the thought of that little girl which caused him to do it, and therefore I say it was she that did it, not him."

The effect in court of the child, of Mr. Howe's tear stained face, his wonderfully sweet voice, and the picture was electrical, and instead of convicting Unger of murder in the first degree the jury convicted him of manslaughter, and Unger was sentenced to State prison for twenty years.

It seems difficult to those those who never came under the influence of Mr. Howe's voice and eloquence to realize that such victories could be achieved by any lawyer, and it will be many a day before his equal is seen again.

So remarkable were his victories that judges were amazed and told the great lawyer in open court, and jurors, that prisoners should not have been acquitted or let off so easily.

The late Justice Smyth, who for many years held the office of Recorder and as Recorder Smyth was the terror of all criminals, presided

at the trial of a Bruto Calegero, whom Mr. Howe saved from the electric chair. Recorder Smyth said at the conclusion of the trial:

"Before proceeding to sentence this prisoner, I desire to say to you, Mr. Howe, that he is indebted to you for the position in which he stands to-day. You saved his life. How it was that you succeeded in convincing a jury of twelve intelligent men that this man was only guilty of the crime of manslaughter in the first degree is something beyond my comprehension, except this, that I do know that you are the ablest lawyer at the bar of this or any other criminal court, as you have succeeded in inducing this jury to believe that this man killed the deceased in the heat of passion by means of a dangerous weapon, without any design on his part to kill."

Recorder Smyth then turned to the prisoner and said: "The evidence in this case satisfies my mind that you were guilty of the crime of murder in the first degree, and that you were saved from the conviction of that degree of crime is solely to be attributed to your counsel."

In a letter dated April 26, 1892, the late Judge Noah Davis wrote to Mr. Howe concerning the case of the People vs. Webster: "As a judge I feel free to say that your speech is not only creditable but powerful. Some portions of it are touchingly eloquent, and taken as a whole it is one of the most effective addresses of its kind I have read in many a year. I know little or nothing of the merits of the case, and therefore speak only of the merits of the argument. As the 'Father of the Criminal Bar' of our city you have vindicated your title, and long may you live to enjoy it."

Many amusing stories are told of Mr. Howe's experience with criminals. Several years ago he was held up by two footpads on a dark night. While one of the men was going through his pockets Mr. Howe exclaimed:

"Dickey the Brute, I didn't think this of you after all I have done for you." The man addressed peered into the lawyer's face and exclaimed, "Why, you're Howe the lawyer."

The fellow turned to his companion and said. "Let him go Jack; you will want him to lie for you some day as hard as he did for me when he got me off twenty years sure."

Mr. Howe, with a smile on his face, recently told what he said was the greatest compliment he had ever had paid to him by a client. He

said that a few weeks after he had secured the acquittal of a man on a charge of burglary, the man sent for him, telling him he was once more in the Tombs Prison.

"I went to see him," said Mr. Howe, "and asked him what he was doing in jail again, after promising me he would never commit another crime (Mr. Howe smiled as he said "commit another crime"). The man said:

"Well, you see, Mr. Howe, I enjoyed your speech so much last time, and it did me so much damned good to see you knock out that lying District Attorney, that I just couldn't keep my word to you."

It was not only in the courts and among lawyers and judges that genial Bill Howe was known. He was a familiar sight and a well known character at the theatre, the race track, and in all places where men of genial habits are accustomed to gather. He loved all that was beautiful in nature and all the sparkle and glitter of the artificial life as well. He wore loud clothes and many diamonds because, he said, he liked brightness and glitter. Although nearly 75 years old when he died, he was of a sunny and happy disposition and loved to keep in touch with the latest events in the sporting, social and theatrical worlds.

When asked shortly before his death to what he attributed his great success with jurors, Mr. Howe said: "I kept in touch with human nature. I appealed to the jurors as men. I endeavored to bring them close in touch with human weakness and human frailties. When I had a desperate case I tried to make each juror stand in the position of the prisoner when he committed the crime, to make the hearts of the jurors boil with the same temptations that actuated the person to feel as he did. When I had done that the rest was easy, for human nature is the same at all times, in all ages."

This may all be true, but few men understood human nature as did "Howe the lawyer," and when his body was lowered into its grave there passed from earth, in the opinion of many, not only one of the gentlest and most generous men who ever lived, but the last of the great criminal lawyers of the old school.—(N. Y. "Evening Sun."

Some folks smile—and then their face flies back like a spring lock.—*Reuben.*

The Intelligent Voter.

THE Virginia Law Register gives an amusing account of the experience of a Registrar under the new election law in that State.

The replies which the aspirant for the elective franchise made in the preliminary inquisition are given in the Registrar's own language:

"The definition of 'General Assembly' seemed to be the *bête noir* of the colored brethren, and the definition of that term varied with each applicant. One answered that the General Assembly was the 'President'; another that it meant the 'Constitution,' whilst still another said that 'enny 'sembly of de people is de Gen'l 'Sembly.

I remember reading, some time ago, various humorous answers of children to questions propounded by teachers in history. Among them was this 'Phillip II was born in the absence of his parents,'

The answer of a darkey to the question whether his father fought in any war is, I believe, equally good. He said, No, sah: my father died two years befo, I wuz born!" Some of the answers, however, by the would-be-voters were so humorous and, in a measure, so truthful, that the respondents should have been permitted to qualify. When asked the definition of "perjurer," one negro looking solemn and wise, and with an air of expectant victory, said, "perjurer? Why dats a successful business man, cose." Another being asked what "suffrage meant, replied that it meant 'all suffered alike." Among other applicants was Uncle Jim' who, through his employment as furnace man in the Law Building, had lived for some years in a legal atmosphere. The writer, desiring to keep in Uncle Jim's good graces and thereby insure a well-heated office during the coming winter, proceeded, as he thought, to let Uncle Jim down light. He was asked "Who made the laws?" It seemed that Uncle Jim had absorbed too much "atmosphere," for he quickly replied, "De lawyers." The truth of the statement, however, conflicted with the legal fiction that our laws are made by the General Assembly, and Uncle Jim was sent back to absorb a mere orthodox legal atmosphere.

Later came one who might have sat for the picture of "Sam" in "Marse Chan"—elderly, polite, and *ante bellum*. "Well, uncle, who do you think make the laws?" "Boss," he replied, "dey tells me dat dere

is twelve men down yander in Richmond dat makes de laws, and dey sends dem up here to de Mare and if de mare don' like ,em he sen' em back."

Being asked for a reasonable explanation of section 14, and particularly of the term "uniform government" in said section, one son of Ham surprised the registrars with the information that an uniform government "is a milliterry guv'ment whar all de guv'ment folks wars uniforms." It was not always the negro, however, who failed to satisfy the registrars of the applicant's qualifications, and often a white voter would fail to answer the simplest question. I recall asking a white man to explain the phrase "No man shall be deprived of his property," etc. His reply was that a man's vote was his property, and the section above meant that one's vote could not be taken from him. He surprised me by not adding "unless paid for."

After two weeks of service as registrar, notwithstanding the strong convictions I had that it was wrong to disfranchise any large body of our citizens, I underwent a complete change of mind and heart. I believe now more firmly than ever, and with my recent experiences fresh in my mind, that suffrage should be, properly, a "privilege" and not a "right," and that our State would be greatly benefited by an even more stringent and restrictive suffrage than that promulgated in the recent Constitution.



Picture of a Wise Man.

HE is one who understands himself well enough to make due allowance for unsane moods and varieties, never concluding that a thing is thus or thus because just now it bears that look; waiting often to see what a sleep, or a walk, or a cool revision, or perhaps a considerable turn of repentance will do. He does not slash upon a subject or a man from the point of a just now risen temper. He maintains a noble candor by waiting sometimes, for a gentler spirit and a better sense of truth. He is never intolerant of other men's judgments because he is a little distrustful of his own. He restrains the dislikes of prejudice because he has a prejudice against his dislikes. His resentments are softened by his condemnations of himself. His depressions do not crush him, because he has sometimes

seen the sun, and believes it may appear again. He revises his opinions readily because he has a right, he thinks, to better opinions, if he can find them. He holds fast sound opinions, lest his moodiness in change should take all truth away. And if his unsane thinking appears to be topping him down the gulfs of skepticism, he recovers himself by just raising the question whether a more sane way of thinking might not think differently. A man who is duly aware thus of his own distempered faculty makes a life how different from one who acts as if he were infallible and had nothing to do but just to let himself be pronounced!—Horace Bushnell.



Thought-provoking Facts.

THE Census Bureau sends out a statement concerning the median age of the total population in 1900, that is, such an age that half the population is under it and half over it. It appears that it is 22 years and 8 months, as compared with 21 years and 9 months in 1890. Of the white population it is 23.4; and the colored, including Negroes, Indians, and Mongolians, 19.7. From 1810 to 1900 there is an increase in the median age of the white population amounting to 7 years and 4 months. It is, however, a mistake to think, as many do, that this has resulted chiefly from the progress of medical and sanitary science. The decrease in the relative number of children born has made the earlier age periods less preponderant numerically, and the influx—especially since 1840—of great numbers of adult immigrants increases the number of older age periods. This decrease in the number of children will tell upon the future career of the country in a way that will give our descendants occasion for very serious consideration;—for the decrease is not among the first generation of immigrants, nor to a very great extent in second, unless the immigrants prosper and begin to live luxuriously. Old World traditions therefore will increasingly prevail, relatively to the traditions derived from those who founded our institutions.

— M. V. S.

Daisy Medders (who is cultured): "What do you think of Walter Scott's writings, Mr. Green?"

Jay Green (who is not): Well I guess his emulsion is about the best thing he ever wrote.

Gates, a lawyer from Lynn, was a contemporary of Choate and Saltonstall. He was in the habit of writing for publication in the newspapers. He wrote and published a lengthy article for which he was indicted. He was a poor man and intended to try his own case. Choate hearing of his trouble said to Saltonstall, "Gates is in trouble; don't you think that we ought to help him out?" To this Saltonstall agreed and was sent by Choate to Gates to talk it over and see what could be done. Gates was very grateful and desired that Mr. Choate should try the case for him.

The case was called and the article was read to the jury, with such explanations made that showed Gates to be the author of it. This closed the government case. Mr. Choate then arose for the defense, and taking the paper from his pocket proceeded to read the same article slowly and with such intonation that when he had finished reading it, the complainant arose and said: "If that is the meaning of the article just read we have no reason to find the slightest fault with it; and the case was abandoned.

A portly and pompous man who held a commission as brigadier-general of militia, and a license to practice law,—neither of which he had much occasion to use, found himself the proud enjoyer of a case in the Supreme Court, and fondly dreamed of seeing his name as counsel for the plaintiff, above a long and elaborate opinion, in the reports.

He was mightily disappointed and enraged when, during opinion day, he heard his case called and the simple announcement made from the bench, "Affirmed."

After adjournment he went to Judge McKinney, with whom he enjoyed personal acquaintance, and said: "Judge, I thought that the Supreme Court, at least, would obey the law."

"Wherein has the Supreme Court failed?" asked the judge.

The law requires that a written opinion be delivered in every case this court tries, and none was delivered in the case of *Smith v. Brown*."

Let me see about that. Mr. Marshal, please bring me the record in *Smith v. Brown*."

The judge took the rolled record, and glanced at the bottom of the outside page. Placing his finger upon the written but abbreviated "aff'd." he said to the ambitious general: "See there! 'Aff'd.' Damn it, isn't that a written opinion?"

Having thus won his case he turned on his heel and contemptuously left the disappointed lawyer to his reflections.

A friend wrote to Mark Twain asking his opinion on a certain matter, and received no reply. He waited a few days and wrote again. His second letter was also ignored. Then he sent a third note, including a sheet of paper and a two-cent stamp. By return post he received a postal card on which was the following:

"Paper and stamp received. Please send envelope."

WEST VIRGINIA COURT OF APPEALS,
Decisions Handed Down at the Last
Term.
REPORTED SPECIALLY FOR THE READERS OF THE BAR.
Appearing Here For the First Time in
Print.

Webster Lumber Company,

v.

Keystone Lumber & Mining Co.

From Webster County.

Affirmed in part, reversed in part and decree for appellant.

Poffenbarger, Judge.

Syllabus.

1. Section 3 of ch. 74 of the Code, requiring notice of a reservation of title to goods and chattels sold upon condition precedent to be recorded in the clerk's office of the county court of the county where the property is, does not apply, unless possession of the property be delivered to the buyer.

2. When the property so sold is a structure upon the real estate of the vendor, capable in its nature of being made a fixture, and it is agreed between the parties that it shall not be removed until paid for, there is no delivery of possession although the buyer, as tenant or licensee upon the land, has the use of such property.

3. The W. L. Co., being the owner of a tract of timbered land, contracted with the owner of a mill to saw the timber and with W. & M. to log it. By the original contract W. & M. were to construct a railroad on the lands of the company, at their own expense, for the logging of the timber, but finding themselves unable to buy the materials, the W. L. Co. bought and paid for them and had them shipped to the land in its own name and laid down by W. & M. with the understanding that they were to be and remain the property of the W. L. Co. until paid for by W. & M. After the road was thus completed the new contract was reduced to writing and it was therein stipulated that the W. L. Co. was to hold and own all materials purchased by it in its own name until further transfer by a sufficient bill of sale therefor. W. & M. becoming indebted to

the K. L. & M. Co., said company in an action at-law attached the railroad and had it sold as the property of W & M, at which sale it became the purchaser, Held: that although there was a sale of the railroad materials by the W L Co to W & M there was not a delivery of the possession thereof to the buyers, and, although no notice of the reservation of the title was recorded, the K L & M Co acquired no title to the materials by its purchase, and equity would enjoin it from removing them.

Newberger and Newberger,
v.

Wells and Leonard.
From Wood County.

Affirmed.

Poffenberger, Judge.

Syllabus.

1. In matters of concurrent jurisdiction, equity, by analogy, applies to stale claims, the bar of the Statute of Limitation, and recognizes the same exceptions to its operations that are allowed in courts of law.

2. When a bill in equity discloses on its face laches, or the facts alleged show that the cause of action is within the Statute of Limitations, the bill is for that reason demurrable, unless sufficient facts are set forth in it to avoid laches or take the case out of the Statute.

Marshall

v.

Hall.

McWhorter, Judge.

From Jefferson County.

Affirmed in part, reversed in part and remanded.

Syllabus.

1. W devised to H "To him, his heirs and assigns" a farm described "he paying to my executor twelve-thousand dollars in five equal annual payments, bearing interest from the date of my death, such payments to be disposed of as hereinafter provided," and giving H one month from the date of the probate of the will in which to refuse in writing to take the farm, H elected to take it. Held: that the twelve-thousand dollars was purchase money and a lien upon the land and as such prior to all other liens or claims created upon the said land by Hall, as well as judgments recovered against him.

2. A legacy of \$3,000 by the same will was bequeathed to H to be held by him in trust, the interest to be paid to B during his life and at his death the \$3,000 to be paid to other parties named. R., the executor of W., having collected from H. \$9,000 of the purchase money, instead of requiring H. to pay the residue of \$3,000 took from H. his receipt for that amount, being the amount of the trust legacy and treated it as the residue of the purchase money as paid by H. Held; a misappropriation of the trust fund and that the money not having been paid by H., the lien for the residue of the purchase

money upon the land remained valid and inured to the benefit of the beneficiaries of the trust legacy.

Childers

v.

Loudin.

From Webster County.

Reversed and Remanded.

Poffenbarger, Judge.

Syllabus.

1. When a circuit court being about to end, without dispatching all its business, is adjourned, by the judge thereof, to a future day by an order entered of record, as provided in sec. 4 of ch. 112 of Code, all judgments, orders and decrees, rendered and made by such court before or during the day on which such court adjourns to such future day, become final on such adjournment as if the adjournment itself were final, and cannot be set aside at the adjourned term.

2. On an appeal or writ of error, the whole record is before the court, and it will reverse the proceedings in whole or in part, if prejudicial error thereon is perceived against the appellant or defendant in error, and such error may be cross-assigned.

3. Judgment creditors and other incumbrancers are not necessary parties to a bill for partition, even where a sale of the premises is decreed, unless they be creditors of a deceased person who was a tenant in common, joint tenant or co-parcener. In other cases it is proper to sell the land subject to the liens.

4. It is the duty of the court, before decreeing a sale in a partition suit, to judicially determine the rights and interests of the co-tenants in the land, and failure to do so is ordinarily reversible error.

5. When real estate is sold in such suit, without a judicial ascertainment of the interests of the parties, and is purchased by a co-tenant who never appeared in the cause, nor in any way aided in bringing the property to sale, and the sale is confirmed without objection, his title is protected by sec. 8 of ch. 132 of the Code, notwithstanding the error in the decree of sale, and the co-tenant parties must resort to the fund arising from the sale.

Nutter

v.

Brown.

From Harrison County.

Reversed and remanded.

Dent, Judge.

Syllabus.

1. A principal is bound by the agreements, representations, concealments and mistakes of his agent made as a part of the *res gestae* or the transaction.

2. The jurisdiction of equity to reform written instruments, where there is a mutual mistake, or mistake on one side and fraud and inequitable conduct on the other, if the evidence be sufficiently cogent

to thoroughly satisfy the mind of the court, is fully established and undoubted.

John S. Reecher,

v.

Thomas Foster & others.

From Ritchie County.

McWhorter, Judge.

Reversed in part, affirmed in part, and remanded.

Syllabus.

1. Implied trusts are within the statute of limitations and the statute begins to run from the time the wrong was committed by which the person becomes chargeable as trustee by implication.

2. H. & B. and M. filed a petition, answer and cross bill in a cause setting up a note of one F. held by them by assignment of H., the payee, as collateral to secure their respective claims and also to secure the claims of other creditors of said H. mentioned in the said petition, answer and cross-bill, but claiming priority and preference to plaintiffs in said cross-bill, over the other beneficiaries in said assignment mentioned. Held: such other beneficiaries were necessary parties to the petition and cross-bill.

3. A party cannot stand as a representative of others to whom his own interests are hostile and adverse.

4. Under the last clause of sec. 6, ch. 72, Code, where a debtor conveys all his property to a trustee for the benefit of his creditors or where he so conveys it all except what is exempt from execution or other process, and where it is made the duty of the trustee to take possession, control, manage and administer the trust property the commissioner of accounts in stating and settling the accounts of such trustee should make the same allowances to him for reasonable expenses and reasonable compensation in the form of a commission as should be allowed to an executor or other fiduciary under sec. 17 ch. 87 Code.

Parish Fork Oil Co.

v.

Bridgewater Gas Co.

From Wirt County.

Affirmed.

Poffenbarger, Judge.

Syllabus.

1. An agreement whereby certain lands, in consideration of fifty dollars, are granted, demised, leased and let for the sole and only purpose of boring, mining and operating for oil and gas, and laying pipes and building tanks, stations and houses thereon to take care of the products, for the period of fifteen years, and providing that the lessee shall complete one well on the premises within one year from its date, or pay the lessor a rental of fifty cents an acre for each year the lease may remain in full force after the first year, immediately after which provision the following stipulations are written: "But it is agreed

and understood that the fifty dollars paid in cash is to pay all rentals on this lease for the period of one year from the date hereof it is further agreed that when the first well is completed on said premises, then all cash rentals shall cease," does not bind the lessee to do anything further after completing one well on the premises, and, upon his abandonment of further operations upon the premises for more than eighteen months, leaving the well unprotected so that it caved in and partially filled up, the lessor, after waiting a year or more, from the date of abandonment, had the right to lease the land to another.

2. The principal purpose and design of the parties to such a lease, clearly discernable from its terms, being, the production and marketing of the oil and gas in the land, for their mutual benefit, mere discovery of oil, by exploration under it, vests no title to it in the lessee, but it does vest in him the right to produce and take the same in accordance with the terms and conditions of the contract. In such right the lessee will be protected, but he must proceed to exercise it with reasonable promptness and diligence.

3. When its terms will permit it, under the rules of law, an oil lease will be so construed as to promote development, and prevent delay and unproductiveness.

4. The law recognizes a distinction between the abandonment of operations under an oil lease and an intention to abandon or surrender the lease itself. Unless bound by the term of the lease so to do, it will not permit the lessee to hold the lease without operating under it, and thereby prevent the lessor from operating on the land or leasing it to others.

Mistake as To Rule of Survivorship.

THE succession to the property of Mr. and Mrs. Fair, who were both killed recently in an automobile accident, has greatly interested some of the public journals. The question as to the presumption of survivorship in such cases being new to some of the newspaper writers, they have discoursed upon it as a "nice" point of law. One of the daily papers has acquired legal erudition enough to discover that this is by no means a rare question, and has proceeded to correct its contemporaries on that point. But, unfortunately, while it has discovered that "there have been many suits based on this question of survival," it proceeds to announce the law to be exactly what it is not. Its declaration is that "the law presumes, in cases of shipwreck and other fatal accidents where a number of people perish together, that the strongest live the longest, that the grown people survive the children, and that the men survive the women." But according to the common-law doctrine established in England

and in nearly all the United States, differing from the civil law, there is absolutely no presumption on the subject, and the whole question is one upon which any one who claims survivorship of a particular person has the burden of establishing that fact. The cases on this subject were carefully collected and analyzed in 51 L. B. A., page 863, where it is shown that there are no authorities contrary to this doctrine in any part of the Union except where the statutes have made a different rule, as in Louisiana and California.

The most interesting part of the subject of the succession of the Fair estates is with respect to the effect of a possible conflict of laws. If the victims of this accident were domiciled in California, the statutory rule in that State will raise a presumption, unless there is evidence or reasonable inference to the contrary, that Mr. Fair survived his wife. This rule however, would certainly have no force or effect in respect to any real property which either of those parties may have owned in other States. With respect to the distribution of any personal property that either of them may have owned in other jurisdictions, there may be much difficulty in determining whether it goes to the representatives of the husband or of the wife; and, since the rule is chiefly one of burden of proof, the defendant may succeed by reason of the failure of plaintiff to make any proof on the subject. The disposition of courts in many cases to protect the rights of the residents of their own State may also be a factor under some circumstances, as for instance, in case of ancillary administration when the turning over of the assets in the State to a foreign administrator is contested by a resident who asserts some right in them. No such question as this may arise in respect to these estates, but questions of this kind are suggested on which it would be difficult, if not impossible, to find any precedent.—Case and Comment.



The fault of the present day is, that the majority of barristers think more of fees than of law. Formerly it was all law, and the fees were left to Providence. I once heard an old counselor say that there were three stages in a barrister's life. When he is first called to the bar, and full of spirits and ambition, he cares for nothing but the brief. In the second stage, when he has got a great deal of practice and is well-known to the profession, he cares for both briefs and fees. The third stage, when he has become Q. C., acquired a great reputation, and made a large fortune, he cares only for the fees, and nothing for the briefs—the sight of them makes him almost sick.

Legislative Control Over Quasi-Public Corporations.

BY CHAS. A. MACATEE, OF THE FAIRMONT BAR.

A QUASI-PUBLIC corporation has been defined to be a private corporation affected with a public interest, whereupon it ceases to be *juris privati* only. Such a corporation is private in that it exists for the purpose of making money for its individual members, and its affairs are, in general, managed by the private persons composing it. Thus far it is strictly of a private nature, and is not subject to legislative control or regulation. But by the terms of its charter or the nature of the services it renders, the corporation may become a public servant, and the general public may acquire an interest in its business. Whenever its property is put to a use in which the public has an interest, a grant to the public of an interest in that use can be presumed. Such conditions generally exist in railroad, canal, bridge, turnpike, ferry, steamship, telegraph, telephone, gas and water works, and electric lighting companies. These are private in that they carry on business for gain, and public in respect to their duty to serve the public, and are generally classified as quasi-public corporations.

All corporations being created by virtue of legislative enactment, they exist only in contemplation of law, and have no natural or inherent rights. They are essentially artificial in their nature, and are creatures of the State's sovereign power, having such rights, and only such rights, as are delegated to them by their charters. In consideration of the privileges thus conferred, the corporation is presumed to assume the performance of certain duties, and the discharge of certain obligations. Because of these mutual relations, it was early laid down by judicial decision in this country that the charter of incorporation is a contract between the State and the corporate entity created by it, and therefore within the inhibition of the tenth section of article one of the federal constitution. (*Dartmouth College v. Woodward*, 4 Wheat., 518). Manifestly, however, if the act of incorporation reserves to the State the power to alter, amend, or repeal the charter as the legislature may thereafter see fit, there cannot possibly be any question as to the amenability of any corporation so created to

future legislative control, even to the point of total annihilation.

Therefore, bearing in mind what has already been said, this discussion will consider the liability of quasi-public corporations to legislative control, in the exercise of inherent sovereign power. Now what are we to understand by the phrase "inherent sovereign power?"

Vattel defines the prerogatives of sovereignty to be all those "without which the sovereign command, or authority, could not be exerted in the manner most conducive to the public welfare." (B 1, c. 4, par. 45), Mr. Cooley observes that "the term sovereignty in its full sense imports the supreme, absolute and uncontrollable power by which any independent state is governed." (Const. Law, 16). Blackstone declares that in every government there must be "a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside—and by the sovereign power is meant the making of laws." (Bl. Com. 49). Under the form of government existing in the United States the power is manifestly vested primarily in the legislature of the several states, and also in the Congress of the United States in so far as it has been delegated thereto by the various provisions of the national constitution.

Disregarding for the moment the limitations imposed by a written constitution, the legislative body of a sovereign state is, in theory at least, omnipotent. It possesses supreme, absolute and uncontrolled authority. Its acts are unimpeachable and irresistible, and the life, liberty and property of every citizen are at its disposal. It is hampered by no restrictions other than those which its own sense of justice, equity, and conservatism may impose upon it. If it choose, it could condemn private property for public use without just compensation, and vested rights would have no protection against its statutes. Under such a government, therefore, every corporation, whether public or private, would be absolutely subject to whatever control the legislature might see fit to exert. What, then, are the restrictions in this country protecting corporations from unlimited legislative control?

Under our form of government the legislative body has not absolute power. Back of the legislature stands a written constitution of the state, and back of all is a written constitution for the whole nation, wherein the people, in their original character as an independent community, have prescribed certain checks and limitations on the legislatures of the several states. The national constitution, by its own

provision, is the supreme law of the land, and it declares that (1) no state shall pass any law impairing the obligation of contracts, (2) no state shall deprive any person of life, liberty, or property without due process of law, and (3) no private property shall be taken for public use without just compensation; and a separate clause provides that no person shall be deprived of life, liberty, or property without due process of law, which has been generally held to be restraint upon the federal powers. The charter granted by the legislature to the corporation having been decided to be a contract (*Dartmouth College v. Woodward*, 4 Wheat., 518) and the corporation a person (*Covington & Lexington Turnpike Co. v. Sanford*, 164 U. S., 592) within the meaning of these terms as used in the constitution, to this extent is the legislature deprived of its power to regulate or control a corporation created by it. An ordinary corporation, when strictly *juris privati*, is thus practically withdrawn from liability to legislative control. But whenever it is affected with a public interest it becomes a quasi-public corporation, and is, under certain conditions, subject to legislative control in the exercise of inherent sovereign power. We shall now endeavor to show the extent of this liability.

A quasi-public corporation, as has already been intimated, occupies a middle ground between a municipal and a purely private corporation. When the state creates a municipal corporation, it acts from purely governmental considerations. The sole motive in the legislative mind is the establishment of a means of attaining governmental ends. The charter creating such a corporation, so far as its public nature is concerned, is in no sense a contract. It merely empowers the municipality to exercise certain governmental functions. Such a corporation is merely an arm of the state, and exercises powers over its jurisdiction as an agent of the sovereign power. Its functions, rights, and privileges can be enlarged, abridged, or destroyed at the discretion of the legislature. The sovereignty is merely exercising its inherent and inalienable power to govern.

In earlier times governmental operations had undoubtedly a broader sphere than the modern theory recognizes. The State was widely held to possess various paternal and beneficent functions in respect to its citizens and its own material upbuilding and improvement. This has resulted in the modern school of socialism and government ownership, as opposed to the more prevalent and generally accepted doctrine of the least possible interference by government with private businesses.

But disregarding the political question involved, there is no doubt that the State is primarily vested with the power and the duty of providing for the convenience and comfort of its citizens, and the constitution itself has impliedly recognized this principle in giving to Congress the power of established post roads. The same reasoning would put railroads and all sorts of common carriers in the same category, and also telephone and telegraph systems, street railway and electric lighting plants. In former times there seems to have been an almost absolute necessity upon governments to effect almost everything of this sort by the sole and direct agency of the government. But a great and beneficial change has taken place in modern times by which private enterprise is entrusted with such undertakings of internal improvement. The corporation undertaking this work is a private corporation in that it exists for gain and its ordinary affairs are managed by its stockholders, but it is also of a public character in that it undertakes to perform a sort of public office. "It has been said that the control which the legislature is permitted to exercise over the business of a common carrier," says Andrews, J., in *People v. Budd*, 117 N. Y., 21, "is a survival of that class of legislation which in former times extended to the details of personal conduct. This is true. But it has survived because it was entitled to survive. Society could not safely surrender the power to regulate by law the business of common carriers. The legislative power of regulation is demanded by imperative public interests. The same principle upon which the control of common carriers rests has enabled the State to regulate in the public interest the charges of telegraph and telephone companies. These regulations in no wise interfere with national liberty—liberty regulated by law." The corporation devotes its property to a use in which the public has an interest, and must submit to be controlled by the public for the common good, to the extent of the interest which it has created.

There seem to be two generally recognized principles upon which the State can exert its control over quasi-public corporations (1) in the exercise of the power of Eminent Domain and (2) by virtue of its inherent right of protecting itself and its citizens, commonly called the police power. It seems to be well settled that a legislature cannot divest itself of these powers. But it is a remarkable fact that legislatures, in numerous instances, have attempted to abrogate these

rights in the interests of railroad and other quasi-public corporations, and serious argument has been advanced in support of the doctrine that a corporation, by the terms of its charter, may be absolutely exempted from any control whatever by a legislature, or its successors, forever. This proposition strikes at the very root of the question under consideration, and it therefore deserves our attention.

A State may be considered, in a limited sense, a corporative entity, whose membership consists of its citizens. Its business is to provide for their safety, well-being, comfort, health and good morals. If, by its contract with a railroad or other quasi-public corporation, it attempts to part with a power that is essential for the protection of the public, such an undertaking may rightly be considered beyond the scope of its powers and therefore ultra vires. Moreover, it may be said that the corporation, in its contract with the State, contracts with reference to, and having in contemplation, the reserved power of control which every sovereignty must retain within itself. In the leading case of *West River Bridge Co. v. Dix*, 6 Howard, 507, the Supreme Court said: "It cannot be justly disputed that in every political sovereign community there inheres necessarily the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large. This power and this duty are to be exerted not only in the highest acts of sovereignty; they reach likewise the relations of social life. The investment of property in the citizens by the State, whether made for a pecuniary consideration or founded on conditions of civil or political duty, is a contract between the State and the grantee. But into all contracts, whether made between states and individuals, or between individuals only, there enter conditions which arise not only out of the literal terms of the contract itself; they are superinduced by the preexisting and higher authority of the laws of nature, or of the community to which the parties belong. These conditions are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and permanent, whenever a necessity for their execution shall arise." In *New Orleans Gas Light Co. v. Louisiana Light & Heat Company*, 115 U. S., 650, the Court lays down the principle that "the power of the

legislature to subserve the general welfare of the people by all needful and proper regulations, in the interests of health and safety, is inherent in the sovereignty of the State, and cannot be bartered away by contract or otherwise," and the same doctrine was maintained in *Beer Co. v. Mass.*, 97 U. S., 25.

Above the grant contained in the corporation's charter, and higher than the authority of the legislature itself are the interests and well-being of the great public which is to be protected against both the greed of giant corporations, and also the improvidence, neglect or venality of the legislature. Relying on the maxim that *salus populi est suprema lex*, the courts have interposed when the law-making power has attempted to barter away a vital essential of the public welfare, and in *Pearsall v. Great Northern Ry. Co.*, 161 U. S., 666, decided in 1896, the Supreme Court declare that "so important is this power (of control) and so necessary to the public safety and health, that it cannot be bargained away by the legislature, and hence it has been held that charters for purposes inconsistent with a due regard for the public health or public morals may be abrogated in the interests of a more enlightened public opinion." This doctrine is strongly reinforced by the rule of construction laid down by the courts in reference to privileges granted by a legislature. "The object and end of all government," observes Mr. Chief Justice Taney in *Charles River Bridge v. Warren Bridge*, 11 Peters, 420, "is to promote the happiness and prosperity of the community by which it is established, and it can never be assumed that the government intended to diminish the power of accomplishing the end for which it was created."

It may be well to remark at this point that the business conducted by a quasi-public corporation usually differs widely from that carried on by other private enterprises, in that its undertakings are generally monopolistic in their character. Other businesses are necessarily competitive, and the general interests of the public are protected by the constant, permanent force of competition, insuring fair prices and a proper regard to the public convenience. But railroads, water-works, gas plants, et cetera, are inherently monopolistic, and by force of circumstances, or by combinations, the safe guard of competition is avoided. The State must have this power of reasonable regulation, and a legislature cannot barter it away.

(A further discussion of this subject will be concluded in the next Bar.—Eds.)

IN the last number of **THE BAR** we made a general request for information from local bars with a view to ascertaining the status of the Profession in the State.

The following is the form of our request:

This Journal would like to have a short review for publication in successive numbers, of the condition of the Profession in each of the counties of the State. Without calling upon any individual, we will throw open the door to any volunteer in each and all of the counties to send us a review of this character. In order to more clearly indicate the lines of information we seek, we will ask that these reviews answer the following questions:

1. The number of attorneys in active practice.
2. The proportion of attorneys to the population of the county.
3. The names of those who are regarded as leaders of the local bar, and a comparative estimate of their equipment with that of their predecessors.
4. The ethical standard of the local bar—in what particular is it advancing or declining.
5. Are the regulations for admission to the bar effective in your county?

We are sure that all the bars of the State will be interested to read these reviews of every other bar, as well as its own.

We will publish any reviews we receive without disclosing the authorship, if so requested, and they will be regarded as strictly confidential.

Let any member of any bar feel that he is personally invited, and any Circuit-Clerk is included in the invitation to send us these reviews, and we hope to have one from each county of the State.

We have only received one response to this appeal, and that covers only part of the inquiry. This response relates to the bar of Marion county, and is as follows:

THE MARION COUNTY BAR.

1. The number of Attorneys in actual practice. Fifty.
2. The proportion of attorneys to the population of the county. About one attorney of every 750 population.
3. The names of those who are regarded as leaders of the local bar, and a comparative estimate of their equipment with that of their predecessors.

W. S. Meredith, Charles Powell, U. N. Arnett Jr., Ex-Judge Robert Fleming, Ex-Judge W. S. Haymond, F. T. Martin.

Probably no more profound in the law but certainly equal to their predecessors in legal ability. Better equipped academically and safer advisers for the business interests of the country.

We hope to have a response from some one in each of the counties of the State. The door is open to everybody.

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